

RECORD OF TRIAL

COVER SHEET

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

OMAR AHMED KHADR

ALSO KNOWN AS:

AKHBAR FARHAD

AKHBAR FARNAD

No. 050008

VOLUME VIII OF ____ TOTAL VOLUMES

**2ND VOLUME OF TRANSCRIPT
(R. 232-598)**

**APRIL 5 & 7, 2006 SESSIONS
(REDACTED VERSION)**

United States v. Omar Ahmed Khadr, NO. 050008

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

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| II* | Supreme Court Decisions: <i>Rasul v. Bush</i>, 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i>, 339 U.S. 763 (1950); <i>In re Yamashita</i>, 327 U.S. 1 (1946); <i>Ex Parte Quirin</i>, 317 U.S. 1 (1942); <i>Ex Parte Milligan</i>, 71 U.S. 2 (1866) |
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VOLUME II OF TRANSCRIPT

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Lieutenant Colonel Vokey is lead defense counsel	<u>234</u>
The Accused has requested two specific foreign attorneys from Canada to assist the Defense team as foreign attorney consultants. They have agreed to assist the Accused (R. 246). The Presiding Officer suggested that the Defense team implement the Accused's request. If they want the Presiding Officer to order it, they should file a brief. The absence of rules on who approves foreign attorney consultants is discussed.	<u>236-246</u>
Captain Merriam is approved to remain on the case as Detailed Defense Counsel.	<u>247</u>
The Accused announces that he is being punished for exercising his rights and being cooperative. He is boycotting the procedures until he is being treated humanely and fairly. He did not place any limitations on his counsel.	<u>249-251</u>
Defense Counsel states that the Accused was "transferred to solitary confinement for no apparent reason at all." But the issue was not briefed. He contacted the JTF about the move but was not given a reason for the move (R. 253). The Defense, however, had not requested assistance from the Prosecution (R. 253). The Defense and the Prosecution were not provided	

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advance notice of the move to solitary (R. 255-256). The Defense did not give notice of the problem to the Presiding Officer prior to the hearing (R. 257-258). Defense Counsel states that the Accused wants the issue of the move resolved before any other issues (R. 260-261). The Presiding Officer is inclined to address other issues first. Defense Counsel “slams hand on podium” and Presiding Officer orders a recess (R. 261).	<u>251-261</u>
Defense counsel said he wanted to resolve the issue of the move before addressing other issues, but did not have any evidence to present and had not given the Prosecution notice.	<u>261-264</u>
Defense Counsel contacted the JTF Staff Judge Advocate’s office and asked about the Accused’s move, but was not told the reason for the move. The JTF Staff Judge Advocate’s office refused to provide information, such as a person to contact to obtain the needed information (R. 266).	<u>265-266</u>
The Defense wanted to make a motion immediately concerning the movement of the Accused from Camp 4 to Camp 5 because the Accused wanted to resolve that issue first. The Defense asserted the move was to punish the Accused (R. 275). Resolving this issue first is an objective of representation, and failure to meet this objective creates a conflict in representation, which in turn requires resolution under Appointing Authority Regulation (AA Reg.) 3 (R. 276-277). The Defense would need guidance from their State Bar Associations before going forward in their representation of the Accused (R. 279).	<u>267-285</u>
The Presiding Officer explained to the Accused that he wanted to address two other issues first, but that his concerns about the movement to Camp 5 would be addressed (R. 286-289). Defense Counsel objected to the Presiding Officer asking the Accused questions (R. 290-291). The Accused said he did not want the other issues addressed first (R. 291). The Presiding Officer said he was going to direct the Defense Counsel to address the other issues first (R. 292).	<u>286-293</u>

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The Defense objected to conducting voir dire now because of the conflict with the Accused's wishes.	<u>296</u>
The Presiding Officer addressed the following issues during the Defense voir dire (R. 295-451):	
a. previous military assignments	<u>295, 297</u>
b. previous military awards	<u>296</u>
c. experience in law of war cases and/or murder cases	<u>297-303</u> <u>320-330</u>
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h. <i>U.S. v. Edmonds</i>, <i>U.S. v. Acosta</i>, 49 M.J. 14 (CAAF 1998)- (The Presiding Officer was not the trial judge in <i>Acosta</i> (R. 334-335)). In <i>Edmonds</i> the court addressed whether the Presiding Officer's participation was partisan for the Government, and determined it was not.	<u>330-341</u> <u>359-360</u>
i. future plans – recall to active duty after retirement	<u>342-343</u>
j. potential future employment after retirement from the Marines	<u>345-349</u>
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l. prior reversals as a military judge	<u>356-359</u>
m. law review articles, books, news programs, and articles	

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about the Accused that the Presiding Officer had read. And discussion about the impact or relevance of such materials.	<u>360-382</u>
n. training in law of war	<u>383-394</u>
o. process for becoming a Presiding Officer, and learning of such selection	<u>394-399</u>
p. rating chain and administrative support of the Presiding Officer; and contacts with the Office of Military Commissions	<u>399-411</u>
q. The Presiding Officer indicated that a judicial privilege protected his discussions with other Presiding Officers and with the Presiding Officer's Assistant (R. 144-416). The Presiding Officer said the Defense could submit written questions for Mr. Hodges (R. 417). The Defense Counsel made some statements about Mr. Hodges and asked the Presiding Officer about whether he was aware of those facts.	<u>411-420</u>
r. Decisions by other Presiding Officers are not binding on this Presiding Officer	<u>423</u>
s. Review Exhibit (RE) 102 was presented to the Commission. RE 102 describes an out of court or 8-5, in-chambers meeting attended by the parties and the Presiding Officer. This meeting was discussed by the parties. The parties discussed the number or type of motions that might be made and the law that might be applied. The Defense repeatedly sought advice on where to file motions, what to put into those motions, and whether the Presiding Officer had authority to grant relief. The Presiding Officer repeatedly responded that the Defense should file motions with the Presiding Officer, and to cite whatever law, the Defense chose to cite as well as why the Defense did or did not have authority to order a remedy.	<u>429-442</u>
t. The Presiding Officer said he would comply with the Supreme Court's decision in <i>Hamdan</i> (R. 442-444). The Presiding Officer was unfamiliar with some of the District Court decisions and DC Circuit opinions in the habeas cases	

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(R. 444-447). The Presiding Officer said that if the Defense wanted to know the effects of certain decisions, the Defense should file a brief urging particular outcome(s).	<u>442-449</u>
u. The Presiding Officer was unfamiliar with the Draft Commissions Manual (R. 450).	<u>449-450</u>
The Prosecution had no voir dire or challenge of the Presiding Officer.	<u>451</u>
The Defense Counsel challenged the Presiding Officer on two grounds: (1) research and reading media information about the case; and (2) applying for a job with the Departments of Defense and Justice, especially as an Immigration Judge. The Attorney General cares about Commissions, and also appoints Immigration Judges. The Attorney General wrote an Opinion Article on Commissions (R. 469), and he attended an oral argument in Hamdan. The Presiding Officer may decide cases to gain favor with the Attorney General.	<u>452-472</u>
The Prosecutor opposed the challenge for cause.	<u>473-475</u>
The Defense counsel argued in rebuttal. The Defense Counsel added that should the Presiding Officer deny the challenge for cause, he wanted the issue certified to the Appointing Authority.	<u>475-476</u>
The Presiding Officer denied the challenge for cause, and indicated detailed findings would be made at a later date. Any suggested findings by the parties were due by April 19 th .	<u>476-477</u>
The Presiding Officer deferred his decision on whether the challenge issue should be certified.	<u>479</u>
The Defense made a motion to abate the proceedings (<u>RE 79</u>). The Government opposed the Defense motion (<u>RE 85</u>). Essentially, the Defense contended that the President's Military Order (PMO) specified that the Presiding Officer and Commission members were to sit as triers of fact and law,	

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whereas Military Commission Order No. 1 (MCO 1), as amended on August 31, 2005, requires the Commission to sit using the traditional judge-jury model like that used in civil criminal trials and courts-martial. The Defense argued that the reference in the Detainee Treatment Act (DTA) to MCO 1 is too cursory to constitute a statutory endorsement MCO 1 (R. 493-494). Alternatively, MCO 1 includes a clause stating that it cannot be inconsistent with the PMO, therefore the judge-jury model is a nullity (R. 498-499). The Defense argued that the interpretation must be of “lenity” meaning the interpretation most protective of the Accused must be used, rather than the <i>Chevron</i> , regulatory law standard, which gives substantial discretion to the Secretary of Defense, who signed MCO 1 (R. 500-503).	<u>483-514</u>
The Prosecutor relied on his brief, and did not argue the motion.	<u>515</u>
The Defense made a discovery motion (<u>RE 77</u>). The Government’s counter motion is (<u>RE 83</u>). The Defense argued that the discovery rules lack standards, and are subject to constant change. The Defense wanted the standard to be “due process,” rather than “full and fair” as stated in the PMO (R. 528, 530). Additionally all Presiding Officers should be bound by the same discovery rules and orders (R. 529). The District Court has already determined in <i>In re Guantanamo</i> that the Due Process Clause applies to the Accused’s case (R. 531-537).	<u>516-545</u>
The Prosecutor offered REs 97-99, which was some evidence that the Accused committed a law of war violation. The reason this was relevant was because it establishes that a Commission is an appropriate forum for the Accused’s trial. The Presiding Officer stated that he would not consider REs 97-99 because they were not relevant to the discovery motion (R. 553-554).	<u>546-554</u>
The Prosecutor urged the Presiding Officer to consider <i>Khalid v. Bush</i> , which is a District Court case contrary to <i>In re Guantanamo</i> . The Accused is not entitled to “Due Process” But he is entitled to a certain process, and will receive more process and more rights than any other combatant	

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in history (R. 557). The Defense is entitled in discovery to all evidence the Prosecution intends to introduce, and to exculpatory evidence, but not the level of discovery in other U.S. criminal trials (R. 559).	<u>555-560</u>
The Defense made a rebuttal argument. The law of the case is <i>In re Guantanamo</i> because it involves the same issue and parties.	<u>560-563</u>
The Presiding Officer deferred his ruling on both motions.	<u>564</u>
The Presiding Officer explained that he was concerned about the Government's failure to comply with discovery time lines.	<u>565-567</u>
The Presiding Officer described the schedule of future events in the litigation.	<u>575-576</u>
The Accused agreed that if one of his Civilian Defense Counsel (CDC) was absent from the proceeding, the Commission could proceed.	<u>578-583</u>
Hearing recessed on April 5, 2006 at 2130, and was called back into session at 1300 on April 7, 2006.	<u>587</u>
The Defense motion in regard to the movement of the Accused from Camp 4 to Camp 5 is (<u>RE 108</u>). The Defense withdrew the motion because it was in the Defense's best interests to do so (R. 589). The Defense had access to the necessary witnesses and the move was not designed as punishment or to adversely affect the attorney-client relationship (R. 591-592). The move is for a legitimate government purpose (R. 593).	<u>588-593</u>
The Presiding Officer stated that (<u>REs 101 and 109</u>) were presented to the Commission.	<u>593-597</u>
Commission recessed at 1307, April 7, 2006	<u>597</u>
Authentication for pages 232-598	<u>598</u>

1 The Commissions Hearing was called to order at 0858,
2 5 April 2006.

3
4 [Throughout this transcript, Lieutenant Colonel Vokey, U.S.
5 Marine Corps, will be referred to as the Detailed Defense
6 Counsel or DC; and Mr. Wilson will be referred to as
7 Civilian Defense Counsel 2, or CDC2. Captain John Merriam,
8 U.S. Army, previously referred to as the Detailed Defense
9 Counsel or DC will now be referred to as the Assistant
10 Detailed Defense Counsel or ADC. Lieutenant [REDACTED]
11 U.S. Navy, has been excused for this session. Lieutenant
12 [REDACTED] U.S. Navy Reserves, will be
13 referred to as the Assistant Prosecutor or APROS. All
14 other parties from the previous session will be referred to
15 in the same manner as they were in the previous sessions.]

16
17 **Presiding Officer:** The commission will come to order. All
18 those present when we recessed are again present.

19
20 We have a different court reporter but he has
21 been previously sworn. We also have with us
22 today Lieutenant Colonel Vokey, as the detailed
23 defense counsel. Colonel Vokey, will you please

1 state your legal qualifications, status as to
2 oath, and by whom you were detailed?

3

4 **DC:** Yes, sir. I am qualified and certified under
5 Article 27 Bravo of the UCMJ.

6

7 **Presiding Officer:** Please move a little closer to that
8 microphone.

9

10 **DC:** I am qualified and certified under Article 27
11 Bravo of the Uniform Code of Military Justice and
12 I have been sworn.

13

14 **Presiding Officer:** And you were detailed to this case by
15 the Chief Defense Counsel for these commissions?

16

17 **DC:** I was, sir.

18

19 **Presiding Officer:** All right, thank you. And we have
20 another gentleman, and I would presume you are
21 Mr. Wilson?

22

23 **CDC2:** Yes, I am, sir.

1 **Presiding Officer:** If you would please state your legal
2 qualifications as well.

3

4 **CDC2:** I am a civilian counsel who has been determined
5 to be qualified for membership in the pool of
6 qualified civilian defense counsel in accordance
7 with Section 4(c)(3) of the Military Commission
8 Order Number 1.

9

10 **Presiding Officer:** And you have been sworn?

11

12 **CDC2:** I have.

13

14 **Presiding Officer:** All right, thank you. Please be
15 seated. And I take it Colonel Vokey, you will be
16 the lead counsel for the defense?

17

18 **DC:** That is correct, sir.

19

20 **Presiding Officer:** Major [REDACTED] Major [REDACTED]----

21

22 **PROS:** Lieutenant [REDACTED] sir.

23

1 **Presiding Officer:** Lieutenant [REDACTED] is not here?

2

3 **PROS:** Lieutenant [REDACTED] is here, sir. Lieutenant
4 [REDACTED] has been excused by the Chief Prosecutor
5 for this session.

6

7 **Presiding Officer:** Was I made aware of that?

8

9 **PROS:** I don't believe so, sir. Lieutenant [REDACTED] and
10 Sergeant [REDACTED] the paralegal for the
11 prosecution for Khadr is also present.

12

13 **Presiding Officer:** And that is the young lady sitting
14 behind you?

15

16 **PROS:** Yes, sir.

17

18 **Presiding Officer:** And she will not be addressing the
19 Commission; she will just simply be assisting the
20 government?

21

22 **PROS:** Yes, sir.

23

1 **Presiding Officer:** Colonel Vokey, at the last session we
2 held, which you were you not on the case at the
3 time, there was some discussion between myself
4 and Mr. Ahmad and the accused as to whether or
5 not he wanted the assistance of a Canadian
6 attorney. At the 8-5 that you participated in
7 that was also discussed briefly and it was
8 indicated that you had the lead on that. Has
9 that been resolved?

10

11 **DC:** That has been resolved, sir. Omar Khadr wants
12 the assistance of foreign attorneys [REDACTED]
13 and [REDACTED] both from Canada.

14

15 **Presiding Officer:** And are they present or are they
16 assisting here?

17

18 **DC:** They are not present.

19

20 **Presiding Officer:** Is it your intention that they be here
21 in the court or, please enlighten me. If he
22 wants the assistance of them, what does that
23 mean?

1 **DC:** He wants the presence of them in court. We don't
2 have them here at the hearing this time. I
3 wasn't sure of the of the procedures to actually
4 have them detailed as foreign attorney
5 consultants, but at this time we ask the court to
6 grant them as foreign attorney consultants.

7
8 **Presiding Officer:** I don't know that I have the authority.
9 Do you have a brief or anything on that for me to
10 look at?

11
12 **DC:** I don't, sir.

13
14 **Presiding Officer:** Do you want to file a brief to have
15 that done?

16
17 **DC:** Yes, sir. You asked us if we--uh--if Omar Khadr
18 wanted the assistance of foreign counsel.

19
20 **Presiding Officer:** Well I asked that question at the
21 previous session. I asked it at the 8-5. I was
22 told you had the lead on it. I would have
23 assumed that if you were going to ask that they

1 be made or that I designate them in some way,
2 which I don't know if I have the authority to do,
3 I don't even know that it is necessary quite
4 frankly, that I would have seen something from
5 the defense giving me an indication that that was
6 what you wanted.

7

8 **DC:** Other than stating it here?

9

10 **Presiding Officer:** Yes.

11

12 **DC:** All right, sir. It was my impression that you
13 didn't have the power to grant foreign attorney
14 consultants so I didn't see a need to brief it if
15 this proceeding----

16

17 **Presiding Officer:** You just asked me. You just asked me
18 to. I'm not----

19

20 **DC:** Yes, sir.

21

22 **Presiding Officer:** I'm not trying to play games here. I
23 mean----

1 **DC:** Well----

2

3 **Presiding Officer:** ----if there is something you want me
4 to do, then I would expect to have some kind of a
5 brief or some kind of a notice in advance so I
6 can at least consider the issue; that the
7 government can have the opportunity to also
8 consider the issue; and that I could make an
9 informed and intelligent decision. I am not
10 saying that there is or isn't a right to have the
11 consultant here, these other attorneys. I don't
12 know, quite frankly, what the procedure would be.
13 It seemed to me that if you wanted a paralegal
14 sitting here, that the fact that you have your
15 clerk sitting behind you, I note.

16

17 **DC:** Yes, sir.

18

19 **Presiding Officer:** It doesn't require any action on my
20 part. I don't know what action would be required
21 should the defense want to employ the services or
22 have the services of a foreign attorney to assist
23 you in representing Mr. Khadr. But if you want

1 me to take some action, I would, and do, require
2 a brief and a motion so that the government can
3 respond and I can look at it and respond
4 accordingly.

5
6 **DC:** All right, sir. We have no problem in briefing
7 that issue. If this hearing has the power to do
8 anything about it, but if not, then it seems kind
9 of useless to file a brief if the Presiding
10 Officer can't take any action. There is no
11 procedures for this. There is nothing in any
12 POMs or directives.

13
14 **Presiding Officer:** Well there is certainly POM 4-3 that
15 indicates that if a party wants relief from the
16 Tribunal that they file a motion or submit a
17 special request. You have indicated that you
18 want me to designate him an attorney or a special
19 assistant to the defense. If that is what you
20 want, then I need a brief from you and a motion.

21
22 **DC:** Certainly, sir. That's--so am I to assume that
23 you have the power to do that?

1

2 **Presiding Officer:** No, I would not assume that. You have
3 asked me for some relief. If you want that
4 relief then you need to file a motion is what I
5 am saying, and then I will take it up after the
6 government has had an opportunity to respond.

7

8 **DC:** I understand, sir, but this is a little bit
9 indicative of the kind of conundrum we are in all
10 of the time. You are telling us we need to file
11 a brief. We don't know who to request it from,
12 the Presiding Officer, the Appointing Authority.
13 There are no rules here.

14

15 **Presiding Officer:** Colonel Vokey there is----

16

17 **DC:** The rules keep changing.

18

19 **Presiding Officer:** -----a very simple rule. The defense
20 has been reminded of it on at least two occasions
21 through the appropriate review exhibits and in
22 the form of emails where they have been reminded
23 if they want relief from the Presiding Officer,

1 they file a motion in accordance with POM 4-3.
2 If you are seeking my assistance in having
3 somebody designated as an assistant, a legal
4 assistant, or whatever, to the defense, than it
5 is necessary for you to file a motion, serve it
6 on the government and serve it on myself so the
7 government has an opportunity to respond.

8

9 **DC:** I understand, sir.

10

11 **Presiding Officer:** And I have an opportunity to review it,
12 research it, and then I can schedule an
13 opportunity for us to hear the motion and if
14 either side decides they want to present evidence
15 on it, they are given that opportunity, and I
16 will hear it and decide the issue.

17

18 **DC:** Sir, is there anything beside POM 4-3 that we
19 need to look at in order to brief this issue?

20

21 **Presiding Officer:** I am not going to tell you how to do
22 your research, Colonel Vokey, you know you have
23 got four attorneys sitting there at the table, I

1 think you could figure it out. It is no
2 different than any other legal issue that you
3 might want to brief; you research it, you write
4 your brief, you serve it, and opposing counsel
5 will respond. I will research it and I will
6 rule.

7
8 4-3 lays out the process that each side must
9 follow should they decide they want to seek
10 relief from the Presiding Officer. Be it to seek
11 additional legal counsel, be it to seek
12 suppression of evidence, or anything else.

13
14 **DC:** All right, sir, but----

15
16 **Presiding Officer:** I would simply ask you to follow those
17 procedures. If you want relief from me, then ask
18 me. And the proper way to do that, is by filing
19 a motion.

20
21 **DC:** Sir, I understand and what you want is a legal
22 brief and I don't know of any authority that even
23 speaks to this. There is no precedent here. I

1 know this was done in the Hicks case. That was
2 an agreement by two governments, and my
3 understanding was that it had nothing to do with
4 the Presiding Officer. So again, I don't know
5 the starting point. I don't know what rule to
6 look to. I don't know what law to look to. All
7 I am notifying the Presiding Officer is the
8 information that he wanted.

9
10 Now we can come up with some kind of brief, but
11 it seems kind of crazy if the Presiding Officer
12 does not have the power to act on it, to go to
13 the Presiding Officer with that issue.

14
15 **Presiding Officer:** And one way to learn whether or not I
16 have that authority would be to brief it, argue
17 it here in the courtroom, and have me decide it.

18
19 **DC:** Sure, sir. Another way would be to have clear
20 rules that told us exactly what----

21
22 **Presiding Officer:** Colonel Vokey----

23

1 **DC:** ----to do before we start.

2

3 **Presiding Officer:** If you want the relief, brief the
4 issue, serve it on the government, and we will
5 take it up.

6

7 **DC:** Yes, sir.

8

9 **Presiding Officer:** Have you made any attempts to have
10 these counsel brought here today?

11

12 **DC:** No, sir. The issue of having [REDACTED] and
13 [REDACTED] has just been recently resolved.

14

15 **Presiding Officer:** What does that mean?

16

17 **DC:** In that we wouldn't have had time to get them
18 here.

19

20 **Presiding Officer:** I understand what "recent" means. What
21 does "resolve" mean? Have they agreed to assist
22 in the defense?

23

1 **DC:** They have, sir.

2

3 **Presiding Officer:** And when did they make that agreement?

4

5 **DC:** I would say probably about a week ago, sir.

6

7 **Presiding Officer:** All right.

8

9 [Long pause.]

10

11 **Presiding Officer:** All right, I want to take up the issue
12 of voir dire at this time. At the last session,
13 the government----

14

15 **DC:** Excuse me, sir. I think we have one more counsel
16 issue, also outstanding which was concerning
17 Captain Merriam remaining on the case.

18

19 **Presiding Officer:** I understood he was on the case. He is
20 sitting here.

21

22 **DC:** Yes, sir.

23

1 **Presiding Officer:** I understood from Captain Merriam, I
2 believe it was Captain Merriam, perhaps it was
3 you, that he had been approved to continue as an
4 additional detailed defense counsel.

5

6 **DC:** That is correct, sir.

7

8 **Presiding Officer:** Okay, I didn't think that was an issue.
9 I thought was resolved. Is there anything else
10 on counsel?

11

12 **DC:** No.

13

14 **Presiding Officer:** All right, I want to take up the issue
15 of voir dire. At the prior session----

16

17 **DC:** Sir, before we take up voir dire, we have another
18 matter to present to this hearing.

19

20 **Presiding Officer:** What is that?

21

22 **DC:** We have a statement that Omar Khadr wants to make
23 at this time.

1

2 **Presiding Officer:** In what--for what purpose?

3

4 **DC:** Before we can go forward with any other process
5 with the hearing, he wants to have a say in what
6 is going on here.

7

8 **Presiding Officer:** What is it that he wants to address?

9

10 **DC:** Sir, it is a short statement. He is prepared to
11 read it right now.

12

13 **Presiding Officer:** Well why don't you give me an idea what
14 it is he wants to address Colonel Vokey?

15

16 **DC:** Concerning the conduct and participation in this
17 Tribunal.

18

19 **Presiding Officer:** Whose conduct and participation?

20

21 **DC:** Mr. Khadr's.

22

1 **Presiding Officer:** All right, Mr. Khadr, do you want to
2 address the Tribunal.
3
4 **ACC:** Excuse me, Mr. Judge, I have been punished for--I
5 have been punished for exercising my rights in
6 being cooperative in participating in these
7 military Commissions. For that I say with my
8 respect to you, and everybody else here, that I
9 am boycotting this procedures until I am being
10 treated humanly and fair.
11
12 **DC:** Sir, I will have the statement that he read
13 marked as a review exhibit.
14
15 **Presiding Officer:** We can do it at a recess.
16
17 You have indicated that you are boycotting, Mr.
18 Khadr?
19
20 **ACC:** Yes.
21
22 **Presiding Officer:** I need you to please speak up at the
23 microphone so I can hear you.

1 **ACC:** Yes, I am boycotting these military Commissions
2 until I am being treated fairly and humane.

3

4 **Presiding Officer:** And for my information, when you say,
5 "boycotting," what do you mean by that?

6

7 **ACC:** I am not going forward on anything until I am
8 being treated fairly. I am not proceeding. I am
9 not going forward until I am being treated
10 fairly.

11

12 **Presiding Officer:** All right, and are you placing
13 limitations on your counsel as to what they do?

14

15 **ACC:** No.

16

17 **Presiding Officer:** Please have a seat. Thank you.

18

19 [The accused did as directed.]

20

21 **Presiding Officer:** Colonel Vokey?

22

1 **DC:** Yes, sir. The issue has arose here in that Mr.
2 Khadr, on the 30th of March, just about a week
3 ago was transferred to solitary confinement for
4 no apparent reason, at all.

5

6 **Presiding Officer:** Wait. Are you looking for me to
7 resolve some issue for the defense or to assist,
8 or to intervene in the way that Mr. Khadr is
9 being held in detention?

10

11 **DC:** Yes, sir.

12

13 **Presiding Officer:** And do I have a motion, or a brief, or
14 a statement of facts? Are you prepared to put on
15 evidence?

16

17 **DC:** Sir, we--no, sir. We have not had the
18 opportunity to brief this in that it just came to
19 light once we arrived here in Guantanamo and it
20 is an issue that we have been sorting out.

21

1 **Presiding Officer:** Are you asking for time to put
2 something together then so that you can brief the
3 issue?
4
5 **DC:** No, sir, not at all.
6
7 **Presiding Officer:** Are you prepared to present evidence on
8 this issue?
9
10 **DC:** I think we have presented evidence at this time.
11
12 **Presiding Officer:** You haven't presented any evidence.
13 Your client has made a statement.
14
15 **DC:** Yes, sir.
16
17 **Presiding Officer:** That he is not being treated fairly and
18 he wants to boycott the proceedings.
19
20 **DC:** Well, sir----
21
22 **Presiding Officer:** That is not evidence.
23

1 **DC:** Yes, sir. It has been a little difficult in
2 getting the evidence in that I have contacted the
3 Joint Task Force here to find out why he has been
4 moved to solitary confinement for apparently no
5 apparent reason, and they have refused to give me
6 an answer.

7
8 **Presiding Officer:** And have you sought--have you asked
9 that any witnesses come here and testify so we
10 can--I mean, somebody is in charge of it, I would
11 presume. Have you asked the prosecution for any
12 assistance?

13
14 **DC:** Sir, the prosecution is well aware of----

15
16 **Presiding Officer:** Have you asked them for assistance,
17 Colonel Vokey? Sit down Major [REDACTED]

18
19 [The PROS did as directed.]

20
21 **DC:** No, sir.

22

1 **Presiding Officer:** Have you asked that any witnesses
2 appear here today for this proceeding?

3

4 **DC:** No, sir.

5

6 **Presiding Officer:** Have you provided myself any advance
7 notice that you were having a problem?

8

9 **DC:** Sir, this is the problem that we were dealing
10 with yesterday. I haven't got there yet.
11 Perhaps if, when I get here, we get quick access
12 to the client, this would have come up a little
13 bit sooner, but that is not the case. Every time
14 we come down here, there is this incredible
15 burden, just to do our normal job. I think
16 everybody has that problem, but particularly us.
17 I have had that difficulty. Everyone is fine. I
18 have met with my client just a little over a
19 month ago. This wasn't an issue. Then on the
20 30th, they moved him to solitary confinement for
21 no reason, whatsoever.

22

1 **Presiding Officer:** Well no reason you are aware of. No
2 reason I am aware of. That still begs the
3 question; you are asking again for relief from
4 me, apparently that is what you are preparing to
5 do. You have not even given me the courtesy of
6 telling me, "Hey, there is a problem that might
7 need your assistance with. We are in the infancy
8 of exploring it, trying to run it to ground, to
9 find the witnesses, to find the evidence, to see
10 if we can resolve it without the Commission's
11 help." You haven't even given me that courtesy.

12
13 **DC:** Sir, I understand that, but I wasn't even given
14 notice that the move was made. The government
15 has known all along.

16
17 **Presiding Officer:** Wait a minute, wait a minute----

18
19 **DC:** I have never been given notice he moved to
20 solitary.

21
22 **Presiding Officer:** Colonel Vokey----

23

1 **DC:** The government knows all about this.

2

3 **PROS:** Sir, I need to address that issue, sir, if I

4 could.

5

6 **Presiding Officer:** Sit down please, Colonel Vokey.

7

8 **PROS:** The government does not know, or the prosecution

9 does not know about a move to solitary

10 confinement. At no point has the defense asked

11 us to assist with this in any way. This is the

12 first I have heard about this since this morning.

13 If the defense wants help from the prosecution,

14 we are more than happy to do that, but we have to

15 know there is a problem in the first place.

16 Again, this is the first we have heard about it.

17

18 **Presiding Officer:** So, I am clear, Colonel Vokey, it is my

19 understanding that your client was brought up

20 here yesterday at--before 1 o'clock, 1300, and

21 you were allowed to meet with him for as long as

22 you wanted to yesterday. Is that correct?

23

1 **DC:** That is correct.

2

3 **Presiding Officer:** And you had that opportunity?

4

5 **DC:** Yes, sir.

6

7 **Presiding Officer:** And at some point, either the day you

8 arrived here or the, what is today; Wednesday,

9 either on Monday or yesterday, you learned of

10 this problem?

11

12 **DC:** That is correct, sir.

13

14 **Presiding Officer:** Did you learn of it yesterday or the

15 day before?

16

17 **DC:** The day before, sir.

18

19 **Presiding Officer:** All right. You and I saw each other

20 yesterday.

21

22 **DC:** Yes, sir.

23

1 **Presiding Officer:** You were coming up the hill and I was
2 going down the hill and we greeted each other and
3 talked, and I was in this building all afternoon
4 yesterday. And at no time did you, or any member
5 of the defense approach me and indicate you had a
6 problem; that you might need the assistance of
7 the Commission or my assistance in resolving.

8

9 **DC:** Yes, sir. Now----

10

11 **Presiding Officer:** Wait. Is that all correct?

12

13 **DC:** It is correct, but it is not the full story. And
14 I must clarify that I think by my client's--Omar
15 Khadr misunderstood one of the questions, in
16 that, does he want his attorneys to participate
17 on his behalf. And that is the issue that we
18 have been wrestling with. Mr. Khadr does not
19 want us doing anything on his behalf as a result
20 of this unfair treatment.

21

22 **Presiding Officer:** I don't understand your statement. He
23 doesn't want you to take any action to address?

1 **DC:** He doesn't want us to take any action at all.
2
3 **Presiding Officer:** Until?
4
5 **DC:** On anything in the Commission proceeding until he
6 is treated humanely and fairly. You asked him
7 the question, if he wanted his attorneys to go
8 forward. He said, "Yes." He misunderstood.
9 That is not his intent. I think if you ask him
10 again, he will say he does not want his attorneys
11 to do anything else until this is resolved.
12
13 **Presiding Officer:** Major [REDACTED] you were going to say
14 something?
15
16 **PROS:** Sir, I think the question was clearly posed to
17 the accused and----
18
19 **Presiding Officer:** I will address----
20
21 **PROS:** ----he answered the question.
22

1 **Presiding Officer:** ----it with the accused in a minute;
2 readdress it with him.
3
4 Though, you are telling me as you stand there,
5 Colonel Vokey, you are prepared to essentially
6 boycott the proceedings as well?
7
8 **DC:** No, sir. That is not what I am saying at all.
9 That is the desire of Omar Khadr.
10
11 **Presiding Officer:** And what is your intention?
12
13 **DC:** Sir, our intention--this creates two problems.
14 First of all, is the ability for him to
15 participate in his own defense, the fact that he
16 is in solitary confinement, the physical and----
17
18 **Presiding Officer:** I am----
19
20 **DC:** ----psychological aspect.
21
22 **Presiding Officer:** ----I am not interested in taking that
23 up right now.

1 **DC:** All right, sir.

2

3 **Presiding Officer:** If you want relief from me on that

4 issue then it is incumbent upon you to, number

5 one, give me a head's up, which you could have

6 done, so----

7

8 **DC:** No, sir, I could not have done that.

9

10 **Presiding Officer:** You couldn't have approached----

11

12 **DC:** [Slams hand on podium.] Sir, yesterday afternoon

13 that is what we discussed [slams hand on podium]

14 all afternoon was that very same issue.

15

16 **Presiding Officer:** We are in recess.

17

18 *The Commission Hearing recessed at 0920, 5 April 2006.*

19

20 *The Commission Hearing was called to order at 0941,*

21 *5 April 2006.*

22

1 **Presiding Officer:** The Commission will come to order. All
2 those present when we recessed are again present.

3

4 Colonel Vokey, you have indicated that at your
5 client's direction, you are not prepared to
6 approach any issue other than the--his treatment.
7 Is that correct?

8

9 **DC:** That is my client's wishes, sir.

10

11 **Presiding Officer:** Is that your intent?

12

13 **DC:** Sir, if possible, I would like to resolve this.
14 If this issue is resolved, and it is solely the
15 issue of the move to solitary confinement, then
16 Mr. Khadr is ready to fully go forward. I would
17 like to resolve that. I mean, this goes to the
18 basic attorney-client relationship I have with
19 him. If we could resolve this, we are ready to
20 move forward; Mr. Khadr is ready to move forward.

21

22 **Presiding Officer:** You don't have any kind of a brief for
23 me. You don't have evidence to present. You

1 don't have witnesses to call. It sounds to me--
2 the government has not been given any type of
3 notice. You are asking the Commission to
4 intervene in the conduct of what goes on down in
5 the detention camps, which, anytime a court or,
6 in this case, a Commission, is going to intervene
7 or intercede into what goes on in a detention
8 facility, it is an extremely serious matter and
9 requires, I think, at a minimum, restraint on the
10 court or Commission's part before they intervene
11 in such a matter because of the issues of
12 security, safety, and all of the other things
13 that are encompassed in running a detention
14 facility.

15
16 You are asking me to make decisions, or you are
17 about to ask me to make decisions where I don't
18 have either the law or the evidence, nor has the
19 government been given the opportunity to prepare
20 evidence or legal briefs, or research it, or more
21 to the point, the prosecutor, based on the
22 statements a moment ago, has not been given
23 notice so that and his good offices--through the

1 good offices of the Appointing Authority or
2 anyone else could intercede and assist you in
3 resolving your concern, which was the point I was
4 attempting to make before hand. If you want the
5 help, you need to ask. And at this point, no one
6 has been given the opportunity to assist you as
7 near as I can tell.

8
9 I am not prepared to entertain such a motion or
10 an issue without the presentation of evidence,
11 without the government first having the
12 opportunity, and by "government," I am talking
13 about the prosecution, first having the
14 opportunity to resolve it and assist you in
15 resolving that issue.

16

17 **DC:** Sir, I do not think you are correct in some of
18 what you just said.

19

20 **Presiding Officer:** Well, I hate to be a stickler, but if
21 you don't pull that microphone around, people
22 aren't going to be able to hear you.

23 [The DC did as directed.]

1

2 **Presiding Officer:** Thank you.

3

4 **DC:** Sir, I don't think you are quite accurate in your
5 statement. We can offer evidence here today,
6 first of all. I can offer a proffer of what my
7 client told me, the events as they occurred to
8 his movement. We ask that a witness be called to
9 speak on the issue of why. Now however, sir,
10 what I did yesterday, after I talked to you was
11 discussed it with my client extensively. I also
12 tried to contact the Joint Task Force SJA's
13 office as to the issue of confinement. Now why
14 did I contact them instead of the prosecutor?

15

16 We have been directed, the defense has been
17 directed that on issues of visitation that we are
18 to make direct contact with the SJA's office of
19 the Joint Task Force, not the prosecutor, not the
20 Appointing Authority. That is what we have been
21 directed to do. I contacted Lieutenant Colonel
22 [REDACTED] over at the SJA's office and asked him why
23 he was moved. He told me he did not know why. I

1 said, "Well, can we find out who?" And he said,
2 "Somebody should know." I asked for a name and a
3 phone number so I could contact the person to
4 determine that. He refused to do that. I said,
5 "Well, can we have an answer?" I have still yet
6 to receive an answer.

7
8 So we were trying yesterday afternoon. I called
9 at about 1830--was the last call I made yesterday
10 afternoon to try to determine why this was an
11 issue.

12
13 Now, Sir, maybe I haven't made myself clear as to
14 why this is such a serious issue.

15
16 **Presiding Officer:** It is not important to me, quite
17 frankly, why it is important to you. What is----

18
19 **DC:** It is not important to me, sir.

20
21 **Presiding Officer:** Why it is important--that is not the
22 issue. The issue is how do we approach a legal
23 issue here in this Tribunal so that it can be

1 resolved in an orderly and competent, and by that
2 I mean, a decision that is based on the law and
3 evidence and facts rather than us winging it, if
4 you will. That is the issue. I am not prepared
5 to wing it.

6
7 **DC:** I agree, sir.

8
9 **Presiding Officer:** The government deserves the
10 opportunity, by "government," again, I am
11 referring to the prosecution, to resolve the
12 issue short of you having to come here and make a
13 motion. As I have viewed the interaction between
14 the defense and the prosecution to date, it seems
15 that there has been a good working relationship.
16 That the government, and again, the prosecution,
17 has attempted where it can to assist the defense
18 and work with the defense and resolve obstacles
19 as you perceive them being placed in front of
20 you. I think Major [REDACTED] deserves that
21 opportunity.

22

1 **DC:** Yes, sir. I will say, however, that Major
2 [REDACTED] was aware of our visitation--he was
3 aware of the movement of Mr. Khadr to Camp Echo
4 for our visits because he checked on those times.
5 So he is aware of the movement of Mr. Khadr for
6 us to conduct visitation on Monday.

7
8 **Presiding Officer:** I am not sure of the significance--I
9 don't know the significance of that. I have
10 never been down to the camps. I don't know of
11 what the arrangements are. I am not aware of how
12 people are being held, where they have to be
13 moved to or from, that is my point.

14
15 I am operating here from complete ignorance as to
16 the problem that you are trying to ask me to
17 resolve. And the only way that I am going to
18 resolve that problem for you is if it is properly
19 briefed, if the defense--or rather that
20 prosecution has the opportunity to first address
21 it, and if I have evidence, if they can't resolve
22 it to your satisfaction, then I have evidence
23 from which I can make a decision.

1 **DC:** I understand.

2

3 **Presiding Officer:** Let me ask if we can reach a
4 compromise here, Colonel Vokey. Because I think
5 that the rights and the things that we are
6 intending on addressing here today are very
7 important to your client. I also think it is
8 very important and I intend to press forward
9 today. Can we put this off until later in the
10 week, in terms of this one issue, so that we can
11 get through the things that we need to do today
12 so that this Commission can move forward?

13

14 **DC:** Sir, if possible, could we have a recess. We
15 would like to have further discussions with Mr.
16 Khadr, if possible?

17

18 **Presiding Officer:** How long would you like?

19

20 **DC:** Sir, I would say we need about 30 minutes.

21

22 **Presiding Officer:** I will give you until 15 after the
23 hour, that is 25 minutes.

1 **DC:** Very well, sir.

2

3 **Presiding Officer:** The Commission is in recess.

4

5 *The Commission Hearing recessed at 0949, 5 April 2006.*

6

7 *The Commission Hearing was called to order at 1015,*

8 *5 April 2006.*

9

10 **Presiding Officer:** The Commission will come to order. All

11 those present when we recessed are again present.

12

13 Colonel Vokey?

14

15 **DC:** Yes, sir. At this time the defense would like to

16 make an oral motion, right now, for appropriate

17 relief from the court, and compel the government

18 to send Mr. Khadr back to Camp Four from Camp

19 Five for the duration of his Commission

20 Proceedings.

21

22 And, sir, there may be an additional reason why

23 we need to do this today before we take on any

1 additional matters and that is, the person who
2 can probably speak best of this, that we know of,
3 is the SJA for the Joint Detention Facility,
4 which is Lieutenant Colonel [REDACTED] And it
5 is our understanding, I just found out during the
6 break that he is going to be retiring in a few
7 days and his departure from the island is
8 imminent. So I would say that it would be most
9 beneficial to call him as a witness and resolve
10 this now, and then we can move forward with the
11 rest.

12

13 **Presiding Officer:** Major [REDACTED]

14

15 Please have a seat, Colonel Vokey.

16

17 [The DC did as directed.]

18

19 **Presiding Officer:** You want to--any comment?

20

21 **PROS:** As far as the----

22

1 **Presiding Officer:** I don't want a comment as to the
2 validity of the motion or whether the relief
3 should be granted or not. As to taking up the
4 issue now or putting it off.
5
6 **PROS:** Sir, I don't see the necessity for resolving this
7 issue today. Regardless of whether Lieutenant
8 Colonel [REDACTED] is on island or not, I would
9 imagine there are many others who could testify,
10 if necessary, regarding the decision-making
11 process with any detainee movement. And I
12 suspect, the decision is not the SJA's in the
13 first place, that it is----
14
15 **Presiding Officer:** Well what you are telling me is that
16 you haven't had a chance to research it, to
17 investigate it, figure out who the decision
18 makers are?
19
20 **PROS:** Yes, sir, that is correct.
21
22 **Presiding Officer:** To look at the law or anything else.
23 Am I correct?

1 **PROS:** Yes, sir.

2

3 **Presiding Officer:** Colonel Vokey, you had indicated--I had
4 asked you before the recess if we could go ahead
5 and move forward on those other issues and take
6 up the issue of your client's custody status or
7 the circumstances on how he is being held in the
8 detention facility at a later date.

9

10 By "later" I am not necessarily talking about
11 coming back 2 weeks from now, although there is a
12 24 April session scheduled for the Commissions,
13 and if need be, I will come back and we can take
14 up any issues that we can't resolve this week.

15

16 But by "later" I am talking about giving the
17 government an opportunity to look at it later
18 this week, later today or tomorrow, attempt to
19 resolve it; in the meantime, we have voir dire
20 and I believe two defense motions that we had
21 intended to take up this morning, actually
22 starting yesterday, and I would like to get to
23 those.

1 **DC:** Yes, sir, and we are prepared to go forward on
2 those.

3

4 **Presiding Officer:** Can we go forward on those now and take
5 up the detention or the custody issue later in
6 the week?

7

8 **DC:** Sir, we don't believe so. As a matter of fact, I
9 think that Mr. Ahmad can speak on that as to why
10 we probably should not proceed right now.

11

12 **Presiding Officer:** Mr. Ahmad, would you like to address
13 that?

14

15 **CDC:** Yes, sir. Colonel, I think the problem that is
16 presenting at this point is that our client has
17 made very clear to us that the objective of the
18 representation at this point is for us to ensure
19 that he is not punished for cooperating in these
20 proceedings. He has told us----

21

22 **Presiding Officer:** Punished by whom?

23

1 CDC: By the government.
2
3 Presiding Officer: For cooperating?
4
5 CDC: Yes, sir.
6
7 Presiding Officer: Continue, please.
8
9 CDC: Sir, he has been transferred from what we
10 understand to be the----
11
12 Presiding Officer: I don't----
13
14 CDC: ----best facility to the worst facility.
15
16 Presiding Officer: ----want to get into the facts of his
17 custody. I want to deal with the issue of why we
18 cannot, in the defense's----
19
20 CDC: Well, I am----
21
22 Presiding Officer: ----position, proceed now.
23

1 **CDC:** I am coming to that, but I think it is important
2 to understand, in that, why this is important to
3 him, and why that then determines what he has
4 defined to be the objectives of our
5 representation of him.
6
7 Because the problem, Colonel, is that it is
8 setting us up for a conflict, and I think we want
9 to avoid a conflict between an instruction from
10 you, to defense counsel, to move forward, and an
11 instruction from our client saying that that
12 would exceed the bounds of the representation as
13 he has defined it.
14
15 I want to draw your attention, Colonel,
16 to Appointing Authority Regulation Number 3. We
17 talked about this last time. It is abundantly
18 clear that the ethical rules of the different
19 jurisdictions, to which we are members of the
20 bar, apply to us and the Appointing Authority
21 Regulation 3 says that. What it also says is
22 that if there is a conflict between a rule of the
23 Commission and what we understand to be our

1 ethical obligations, we can't move forward until
2 the legal advisor to the Appointing Authority
3 coordinates with either the Judge Advocate
4 General of the appropriate armed service, if we
5 are talking about the rules of professional
6 conduct of a service, or the appropriate
7 officials of other jurisdictions.

8

9 **Presiding Officer:** So do you have legal authority right
10 now that would indicate that if I told you to
11 move forward, that that would violate your
12 ethical obligation.

13

14 **CDC:** Yes, sir.

15

16 **Presiding Officer:** Are you prepared to provide that to me?

17

18 **CDC:** Sir, it's that my client----

19

20 **Presiding Officer:** Counselor, it is a simple question.

21 Are you prepared----

22

23 **CDC:** Yes, I am.

1 **Presiding Officer:** ----to provide that legal authority to
2 me?
3
4 **CDC:** Yes, I am.
5
6 **Presiding Officer:** Has it been marked?
7
8 **CDC:** No, sir. It's the rules of--yes, it's been
9 marked. It's a review exhibit. The rules of
10 professional conduct, which were put before this-
11 -before you.
12
13 **Presiding Officer:** I am not sure what--there were several
14 sets of rules that were put before the tribunal.
15 I am not sure which set you are referring to.
16
17 **CDC:** Well, sir. Let me say this, Paragraph 3(c) of
18 the Appointing Authority Regulation Number 3----
19
20 **Presiding Officer:** I have read the Appointing Authority
21 Regulation. I am aware of what it says.
22

1 **CDC:** It says if a conflict exists, this is the method
2 that is to be approached. I have an obligation.
3 Everyone here on this side of the table, and that
4 side for that matter as well, has an obligation
5 to self-police. If we think that something that
6 we are being asked to do is a violation of our
7 ethical obligations, our obligation,
8 respectfully, is not to prove that to you.
9
10 It is to ensure that we don't violate the rules.
11 Because, sir, you don't enforce the ethical
12 rules. The respective bars to which we are
13 members do. We are responsible to them.
14
15 So my client has told me, in no uncertain terms,
16 that this is his objective in the litigation and
17 going beyond that would be going beyond the
18 objectives. My understanding of how I am
19 supposed to comport myself, is that I have got to
20 abide by that, unless I have got some clear
21 guidance from my bar,
22

1 **Presiding Officer:** And I think that is the operative word
2 there, Counselor; unless you have got clear
3 guidance from your bar. Have you sought or
4 received any clear guidance from your bar---

5
6 **CDC:** Sir----

7
8 **Presiding Officer:** That would indicate that if your client
9 says he wants you to only do a certain or
10 represent him in a certain way, that if the
11 Commission orders you to do otherwise, that that
12 would violate the ethical cannons of that bar?

13
14 **CDC:** I think the plain meaning of the ethical----

15
16 **Presiding Officer:** That is not my question, Counsel.

17
18 **CDC:** Sir, this--no. Have I, since yesterday afternoon
19 when I completed my meeting with my client at
20 4:30 in the afternoon; have I, between that time
21 at 8:45 this morning when I came down here,
22 talked to the D.C. Bar? No, sir, I haven't.

23

1 **Presiding Officer:** Thank you, you have answered my
2 question.

3
4 **CDC:** And I happen to know that the D.C. Bar closes for
5 calls from attorneys at 4:00 p.m., so that is
6 correct; I haven't.

7
8 But frankly, I think that from the rules of
9 professional conduct that I am bound by, by the
10 model rules--it's the plain language of the rules
11 in terms of who gets to define what the
12 objectives are. There is no dispute about that.
13 So, if I can step back from that, Colonel, I
14 think what we are trying to do is to avoid that
15 kind of conflict. I don't think that conflict is
16 good for us and I don't think it is good for the
17 proceeding, but unfortunately, I think that we
18 are on the road to that kind of a collision.

19
20 If you put us in a position where you order us to
21 go forward with voir dire and our client has made
22 absolutely clear that that would exceed the

1 objectives of the representation, then we have
2 got an ethical conflict.

3

4 I don't think we want to be in that position. I
5 don't want to be put in it. I don't think the
6 Commission--I don't think it is good for the
7 Commission.

8

9 **Presiding Officer:** Anything else?

10

11 **CDC:** No, sir.

12

13 **Presiding Officer:** Major [REDACTED] any comment?

14

15 **PROS:** Sir, I think this is an issue for, in this case,
16 the civilian defense counsel, to take up and
17 address themselves. If they feel they cannot
18 ethically represent the accused, they should take
19 measures to withdraw from representation. We
20 cannot stop these proceedings every time the
21 accused places limitations on their counsel. He
22 has been detailed military defense counsel and he

1 has civilian counsel who have voluntarily
2 appeared to be here.

3

4 Every time the accused doesn't like what he had
5 for breakfast or doesn't like a certain condition
6 of confinement, we cannot let him dictate what
7 his counsel may or may not do depending on what
8 action they take with regards to his
9 representation. That is all we have, sir.

10

11 **Presiding Officer:** Thank you. Colonel Vokey, anything
12 else?

13

14 **DC:** Yes, sir. Just stating that for both Captain
15 Merriam and myself--feel the very same way about
16 the ethical violation. And, sir this is
17 something that we can fix very easily.

18

19 **Presiding Officer:** Colonel Vokey, we----

20

21 **DC:** Mr. Khadr is not requesting--he is not trying to
22 boycott these proceedings; he has been
23 cooperating all along. All he wants is to be

1 treated fairly. I think this is an issue we can
2 resolve fairly quickly.

3

4 **Presiding Officer:** And I think we can too, later in the
5 week. I think that there are issues that both
6 counsel for the government and the defense are
7 prepared to resolve today and we need to take
8 those up, and we are going to take those up.

9

10 I have asked you before, and I will ask you
11 again; has your client directed you to not
12 participate in these proceedings beyond taking up
13 the issue of his confinement status, in other
14 words, the oral motion that you previously made,
15 and is it your intention to then adhere to that
16 direction?

17

18 **DC:** Sir, he has communicated that he does not want us
19 to participate in the proceedings and I am
20 passing that on to you, sir.

21

22 **Presiding Officer:** And is it your intention----

23

1 **DC:** And we feel that by doing so, we are going to
2 enter into an ethical violation, and that is what
3 we are presenting to the court.

4
5 **Presiding Officer:** Is it your intention then, to not go
6 forward on any issue other than the one dealing
7 with his custody?

8
9 **DC:** Sir, it is our strong desire not to go forward.

10

11 **Presiding Officer:** I didn't ask you what you desired. Is
12 it your intention?

13

14 **DC:** Sir I--I am just informing the court of our
15 ethical violation and--uh--our ethical situation
16 and that the situation demands that we take care
17 of this right now. That is what--I am just
18 informing the court.

19

20 **Presiding Officer:** Mr. Khadr, you have been listening to
21 the dialogue between myself and your counsel and
22 the government counsel?

23

1 **ACC:** Yes, sir.

2

3 **Presiding Officer:** You understand that what I have
4 suggested to your counsel, and through them to
5 you, is that we put off until the government has
6 an opportunity to, by the government I mean,
7 Major [REDACTED] the Prosecutor, look into the
8 issue that your counsel want to raise concerning
9 the status of your confinement. Do you
10 understand that?

11

12 **CDC:** Sir, he said, "Not exactly."

13

14 **Presiding Officer:** All right, what I have asked, because I
15 understand that you want to have the status of
16 your confinement changed, and you want me to
17 issue an order to change that status. Is that
18 correct?

19

20 **ACC:** Yes, sir.

21

22 **Presiding Officer:** All right. What I have asked your
23 counsel to communicate to you, and what I am

1 asking you, is that we have several issues that
2 we need to take up today; the prosecution, Major
3 [REDACTED] the officer sitting over there, needs
4 an opportunity to look into the issue of your
5 confinement status; he needs to go down and talk
6 to some people.

7
8 And until he has the opportunity to do that and
9 come back to me and your attorneys come back to
10 me and present evidence to me, in other words,
11 bring witnesses in here, have people talk about
12 what the status is and why; I can't decide that
13 issue.

14
15 What I want to do now, is to take up those
16 issues, that is, voir dire, where your counsel
17 ask me questions and decide whether there is a
18 basis to challenge me; there are two motions that
19 your counsel have made that are pending, that we
20 were to address this morning; and I want to
21 address those issues. And then later today, or
22 tomorrow, Major [REDACTED] will go down to the
23 camps or talk to the people he needs to talk to,

1 to determine why your status was changed and look
2 into that, and then come back and advise me and
3 then I can address that with your counsel and we
4 can determine if there is something that can or
5 should be done.

6
7 **ACC:** Excuse me, sir, how can I be so sure about if it
8 is going to change or not?

9
10 **Presiding Officer:** You can't be sure if it is going to
11 change until Major [REDACTED] has had an
12 opportunity to look into it and I have heard from
13 him, and from your counsel, and from witnesses.
14 And even if I do that, it doesn't mean that I
15 will necessarily order a change, but they need an
16 opportunity. Major [REDACTED] needs the
17 opportunity. Your attorneys need the opportunity
18 to bring witnesses here so that I can hear from
19 those witnesses and make a determination as to
20 whether something should happen.

21
22 In the meantime, we need to take up issues that
23 deal with other important rights that you have

1 concerning this Commission and I would like for
2 you to allow us to do that, if you will. In
3 other words, let me put that off until later in
4 the week, and we----

5
6 **CDC:** Excuse me, sir.

7
8 **Presiding Officer:** Sit down. Let me put it off until
9 later in the week and we can take up those issues
10 that we need to take up that protect your rights
11 here in this courtroom.

12
13 **ACC:** I am sorry, sir. I can't.

14
15 **Presiding Officer:** All right. You understand that if you
16 don't, and I tell your counsel to press forward,
17 and they don't do anything, you will have waived
18 those rights? Do you want to take a minute and
19 talk to Mr. Ahmad?

20
21 **CDC:** Sir, I would like a moment to address what you
22 just said.

23

1 **Presiding Officer:** You can address me in a minute. Why
2 don't you talk to your client right now?

3

4 [The defense team conferred with the ACC.]

5

6 **Presiding Officer:** Have you had an opportunity to discuss
7 that with your attorneys?

8

9 **ACC:** Yes, sir.

10

11 **Presiding Officer:** Mr. Ahmad, you wanted to address me?

12

13 **CDC:** Yes, sir. I just wanted to state briefly, and
14 respectfully, I think it is obviously appropriate
15 for you----

16

17 **Presiding Officer:** I am sorry, you think what?

18

19 **CDC:** I think it is obviously appropriate for you to be
20 inquiring of the client, of our client to make
21 sure that his desires are understood and also
22 that the consequences of his choices are also
23 understood, but sir, I think you came very close

1 to the line, if not crossed the line, of
2 interfering with our relationship in telling him
3 that you want him to change his mind about the
4 objectives of the representation should be. In
5 telling him that you want him to instruct us to
6 do something different. I think that is
7 intruding on the lawyer-client relationship and I
8 don't think it is appropriate for someone in a
9 position that akin to, in some ways although not
10 to others, a judicial officer position, to do
11 that. I just wanted to note that. I don't think
12 it is appropriate.

13

14 **Presiding Officer:** It is noted.

15

16 Is it your desire, Mr. Khadr, to continue to
17 boycott, if you will, these proceedings, in other
18 words, you don't want your counsel to bring up
19 these other issues until this issue of your
20 custody has been resolved?

21

22 **ACC:** Yes, sir.

23

1 **Presiding Officer:** And you understand that I am going to
2 ask your counsel to push forward on those other
3 issues? Do you understand that?

4
5 **ACC:** Yes, sir.

6
7 **Presiding Officer:** And you understand that if they do not,
8 that those issues, your rights with respect to
9 those issues, will be waived?

10
11 **ACC:** Yes, sir.

12
13 **Presiding Officer:** And you have discussed with your
14 attorneys?

15
16 **ACC:** Yes.

17
18 **Presiding Officer:** And you understand it?

19
20 **ACC:** Yes, sir.

21
22 **Presiding Officer:** All right.

23

1 Colonel Vokey, I am not going to take up the
2 issue of your client's status at this time. If
3 you want to prepare some sort of legal brief on
4 it, serve it on counsel, opposing counsel and
5 myself, we can take that up later in the week.
6 At this time, I am going to press forward on
7 those other matters that are before the
8 Commission and we are going to resolve those. If
9 you elect, rather let me, before I say that; do
10 you have any legal authority that says it is an
11 ethical violation of your responsibilities to
12 your client or to your bar for you to press
13 forward on those issues as I have directed.

14

15 **DC:** Sir, I believe Mr. Ahmad has already stated our
16 position. Is the court directing us to go
17 forward despite the conflict?

18

19 **Presiding Officer:** Do you have any legal authority that
20 says if I direct you to go forward and you were
21 to go forward, that would violate your ethical
22 cannons?

23

1 **DC:** No more than what Mr. Ahmad has already
2 announced.

3

4 **Presiding Officer:** All right. Then, yes, I am directing
5 you to move forward and we are going to take up
6 the issue of voir dire and challenges to the
7 Presiding Officer at this time.

8

9 Does the defense have any voir dire for me?

10

11 **DC:** I do.

12

13 **Presiding Officer:** Before we do that. There was one
14 question in the defense's questionnaire that I
15 wanted to update or clarify, and it has to do
16 with providing legal advice to commanders
17 involved in the actions in Iraq or Afghanistan.
18 While I served as the--I believe that is question
19 D(5) or 6. It is on page four of your
20 questionnaire, page 10 of the exhibit, that is
21 Review Exhibit 29.

22

1 While General [REDACTED] served as the Deputy
2 Commander as I MEF, he also served--that is
3 Marine Expeditionary Force, he also served as the
4 Commander of 1st Marine Expeditionary Brigade.
5 He had deployed to Egypt as part of a training
6 exercise.

7
8 As the MEB Commander, at some point he sent the--
9 most of the MEB staff back to Camp Pendleton, I
10 did not deploy with him to Egypt. Then he went
11 on to command an organization or Task Force 58 I
12 believe it was designated, which was the Marine
13 component that went into Afghanistan and
14 established a camp known as Camp Rhino. While he
15 was there, an issue came up about woman serving
16 in combat. I edited a paper that was prepared by
17 the Staff Judge Advocate for Marine Forces
18 Pacific and that was provided to the Chief of
19 Staff of Marine Forces Pacific and ultimately to
20 General [REDACTED]

21
22 DC: Roger.

1 **Presiding Officer:** So I point that out. I also attended a
2 law of war course. I think Colonel Vokey, you
3 had mentioned that you had wanted to attend a
4 similar course. I believe the defense was aware
5 of that, a month or so ago in Charlottesville,
6 Virginia.

7
8 The other thing that I would note on my biography
9 that I provided to the defense, which was Review
10 Exhibit 18, I received my end of tour award, or
11 my retirement award, which was a legion of merit.
12 I also received a certificate in Judicial
13 Methodology from the National Judicial College of
14 the University of Nevada, Reno Campus.

15
16 **DC:** All right, sir. I just want to note that we are
17 going to conduct voir dire right now. Sir, we
18 are doing so under protest because of the fore
19 mentioned conflict we have and problems with our
20 client.

21
22 **Presiding Officer:** I understand.

23

1 **DC:** All right, sir, going to Review Exhibit 18, your
2 biographical summary. I have some questions on
3 that, sir. I see on there that 1982 to 1984 you
4 were assigned to Camp Pendleton as a trial
5 counsel and defense counsel. During that time,
6 sir, do you recall having any murder or attempted
7 murder cases?

8

9 **Presiding Officer:** I don't recall.

10

11 **DC:** Or how about any cases involving law of war, law
12 of armed conflict.

13

14 **Presiding Officer:** There were some cases that came up, and
15 I don't recall that I was directly involved. I
16 believe I was serving as a defense counsel, where
17 there were some Marines assigned as interrogator-
18 translators, and during a training exercise--it
19 was--I believe only Marines and Sailors were
20 involved, there could have been some Army
21 involved, but during a training exercise they
22 captured some people and the interrogator-
23 translators took them down to the surf line and

1 dug a hole, not a deep hole, a shallow hole, and
2 I believe the Marines--the allegation was the
3 captives had their hands tied behind their back
4 and they were made to lay face down in the little
5 hollow thing and as the tide came in, the water
6 broke over the top of the hole and came in with
7 them.

8
9 It was treated as--I don't recall if it was
10 treated as an orders violation or whatever, but
11 it was essentially--the discussion was a
12 violation of the law of war. It also violated
13 the rules with respect to the training exercise.
14 There were limits on how they could treat the
15 captives and what they were supposed to do with
16 them and it violated that as well.

17
18 And I don't recall if they went to nonjudicial
19 punishment or if they received a court-martial.
20 But there were several of them that were charged
21 in some fashion. I don't remember the specifics
22 or how it was resolved.

23

1 DC: All right, sir, and in that case, all the
2 participants and interrogators and----
3
4 Presiding Officer: Everybody was----
5
6 DC: ----were all U.S. Armed Service Members?
7
8 Presiding Officer: Correct.
9
10 DC: All right, sir, how about any--do you recall any
11 murder cases, or attempted murder cases during
12 that period?
13
14 Presiding Officer: That I participated in?
15
16 DC: Yes, sir.
17
18 Presiding Officer: I don't. I don't recall.
19
20 DC: Okay, 1986 to '88, again at Camp Pendleton
21 serving as a Senior Defense Counsel, did you
22 handle any murder cases at that time?
23

1 **Presiding Officer:** I don't recall.

2

3 **DC:** Because I----

4

5 **Presiding Officer:** I didn't handle any premeditated murder

6 cases. I don't even remember that there were any

7 that came up during either of those time periods.

8

9 **DC:** All right, sir, then we move on to the next one,

10 1988 to 1990, is that--I understand you handled a

11 capital murder case?

12

13 **Presiding Officer:** I handled a capital murder case as a

14 defense counsel in the latter half of that tour.

15

16 **DC:** All right, sir.

17

18 **Presiding Officer:** I was assigned as a Senior Defense

19 Counsel at that time.

20

21 **DC:** That was U.S. v. Gibbs?

22

23 **Presiding Officer:** Yes.

1 **DC:** Okay, sir. Any other murder cases or law of war
2 cases during that period?

3

4 **Presiding Officer:** No.

5

6 **DC:** All right, sir, and then you did your first tour
7 as a military judge from 1992 to 1995, again at
8 Camp Pendleton?

9

10 **Presiding Officer:** Correct.

11

12 **DC:** And during that time as a military judge, did you
13 oversee any murder cases, or attempted murder
14 cases?

15

16 **Presiding Officer:** I might have. Not murder, but
17 attempted murder. I don't recall, specifically,
18 I may have towards the latter end of it.

19 Initially I was a Special Court-Martial Judge.

20 Later I was designated a General Court-Martial

21 Judge and I honestly--I don't remember, I may

22 have. And when I say, "murder" or "attempted

23 murder," there wasn't a murder, but there very

1 well may have been some type of a homicide case,
2 either manslaughter or an accidental death,
3 negligent homicide. I am assuming you are
4 looking for answers in all those areas.

5

6 **DC:** I am, sir.

7

8 And seeing the timeframe, you started as a
9 military judge in 1992. Did you receive any
10 cases coming from Operation Desert Shield, Desert
11 Storm, relating to law of war violations?

12

13 **Presiding Officer:** No, and I don't recall that there were
14 any law of war violations. I don't recall any
15 that came out of it. Mostly what I saw coming
16 out of there--I came from being the Deputy SJA,
17 2nd Marine Division, which was involved in Desert
18 Storm, Desert Shield. I don't recall any, in
19 that capacity, I don't recall any law of war
20 violations being prosecuted. I tend to think
21 there were some investigated but I don't recall--
22 mostly what we saw were Marines bringing back

1 illegal weapons. That would have been the lion's
2 share of the crimes that came out of it.

3

4 **DC:** All right, sir. In 2000 to 2002, you were the ,
5 Staff Judge Advocate for I Marine Expeditionary
6 Force, correct?

7

8 **Presiding Officer:** Correct.

9

10 **DC:** Now--so you were the Staff Judge Advocate during
11 the time when the United States--during 9-11 and
12 when the United States sent troops into
13 Afghanistan. What role did you have in planning,
14 coordination, advising, as far as troop movements
15 into Afghanistan?

16

17 **Presiding Officer:** None.

18

19 **DC:** Did you attend any staff meetings that discussed
20 the deployment of Marines to Afghanistan?

21

22 **Presiding Officer:** As I recall, the Marines that went into
23 Afghanistan were part of two MEUs that were

1 deployed already--forward deployed and they
2 consolidated them, or used them, as a single
3 force, is my recollection. And that was all
4 placed under the command of General [REDACTED] who
5 did not take a lawyer with him.

6
7 That was a conscious decision on his part. He
8 had two lawyers out there with him, with the MEUs
9 because each MEU, Marine Expeditionary Unit, had
10 a lawyer with them, and I believe that to the
11 extent that he looked for legal advice, he looked
12 to them.

13
14 I don't recall--or as I recall, the MEF, Marine
15 Expeditionary Force, was in a support role, and
16 so the only involvement we got into was when he
17 reached back and asked for something. I don't
18 remember--I probably received a briefing on
19 something to do with it, but I don't recall what
20 it was specifically.

21
22 The one issue that the task force asked from each
23 of the MEFs, that is I MEF and II MEF, II MEF

1 being on the East Coast, for a surgical team, and
2 I remember becoming involved in that because the
3 I MEF surgical team was approximately half women,
4 and that is how the issue originally came up
5 about women in combat, moving that asset into
6 Camp Rhino.

7

8 **DC:** All right, sir.

9

10 **Presiding Officer:** And I don't, and I don't believe the
11 MEF staff, itself became involved in the planning
12 of the Marines that went into Camp Rhino. I
13 believe that was handled out in theatre by
14 General M [REDACTED] He put together a very small
15 planning staff and relied heavily on the MEUs, as
16 I recall.

17

18 **DC:** All right, sir. In 2002 you assumed the duties
19 as a Circuit Military Judge, the Sierra Judicial
20 Circuit at Camp Pendleton.

21

22 **Presiding Officer:** Correct.

23

1 **DC:** And are you currently a member of the Sierra
2 Judicial Circuit?

3

4 **Presiding Officer:** It is no longer the Sierra Judicial
5 Circuit. I should have updated that as well. It
6 has been re-designated as the Western Judicial
7 Circuit. It now encompasses the three Navy
8 Judges that were used to comprise the South West
9 Judicial Circuit as well as the single judge up
10 in Bremerton that comprised the North West
11 Circuit. That was all rolled into one circuit
12 and became the Western Judicial Circuit and I am
13 currently serving as the Circuit Military Judge
14 for that Circuit.

15

16 **DC:** All right, sir. You mentioned before that you
17 had a wife and daughter who are both paralegals.

18

19 **Presiding Officer:** I didn't mention that before. I
20 mentioned that in the Zahir case, I think.

21

1 **DC:** Yes, sir. What type of work do they do as
2 paralegals? They work for a firm that handles
3 criminal law?
4
5 **Presiding Officer:** No, they work for--my wife works for a
6 firm that handles, primarily, I believe, primary
7 land use planning. They don't do any criminal
8 law. And I don't believe my daughter's law firm,
9 she just changed firms, and I believe they don't
10 do--I don't know. I am not sure whether they do
11 any criminal law or not. I don't believe they
12 do. I believe it is the same type of thing where
13 they deal more of a business-type law.
14
15 **DC:** All right, sir. Do they kind of follow you, as
16 sort of in the legal field?
17
18 **Presiding Officer:** Well I like to think, particularly my
19 daughter, has some admiration for me, and that is
20 why she decided to work in the legal field.
21
22 **DC:** All right, sir.
23

1 **Presiding Officer:** I would be speculating if I said that.
2
3 **DC:** All right, sir. Have you published anything, any
4 legal----
5
6 **Presiding Officer:** No.
7
8 **DC:** ----writings whatsoever?
9
10 **Presiding Officer:** No.
11
12 **DC:** Sir, I see on your biographical summary that you
13 were admitted to the Idaho Bar and the California
14 Bar.
15
16 **Presiding Officer:** That is correct.
17
18 **DC:** And what is your status with each of those bars?
19 Are you active members with either bar?
20
21 **Presiding Officer:** I think Idaho uses the term, "affiliate
22 member," to designate someone that is not
23 actively practicing within the state. California

1 uses, "inactive member," and I am inactive and an
2 affiliate.

3

4 I will, I suppose for purposes of clarification,
5 about a year ago or two years ago, I had my
6 status changed in Idaho to--actually in Idaho and
7 California both, to active, and since have had it
8 turned back to inactive, and I am current in my
9 continuing legal education in both jurisdictions.

10

11 **DC:** All right, sir. I know there is a requirement in
12 the Marine Corps that we recently had to--the
13 attorneys in the Marine Corps, that we had to
14 submit a requirement to Headquarters, Marine
15 Corps, concerning a letter of good standing from
16 the Bar.

17

18 **Presiding Officer:** No, I think that was about a year--last
19 year I think they did it that way. This year
20 they allowed the supervising attorney for other
21 attorneys to simply provide a letter to the Staff
22 Judge Advocate to the Commandant of the Marine

1 Corps certifying that the attorneys that worked
2 for them were in good standing with their bar.

3

4 And that one, in my case, the attorneys that work
5 for me, the other judges, I asked them to provide
6 me something, a bar card, or in several cases we
7 went to their bars because you can access it
8 online through the Internet and just verified
9 that they were in good standing with their bar,
10 and then a letter was sent to the Commandant, or
11 the SJA to the Commandant indicating that the
12 attorneys were in good standing.

13

14 **DC:** Okay, sir, and in your case, you obviously must
15 have submitted something yourself indicating that
16 you were in good standing.

17

18 **Presiding Officer:** I didn't actually sign off on it.

19 General--or Lieutenant Colonel [REDACTED] did. I
20 believe [REDACTED] signed off on it. I will look. It
21 could have been Colonel [REDACTED]

22

1 **DC:** And what bar did you submit that you were in good
2 standing with?

3

4 **Presiding Officer:** I don't know. I gave him my Idaho Bar
5 Card and I think he said he went to the
6 California Bar and verified my bar status with
7 the California Bar. As I recall, when they sent
8 the letter, it said I was in good standing with
9 the California Bar.

10

11 **DC:** Okay, sir. In the state of California, I see
12 that you were admitted to the state bar in 1985,
13 went inactive in 1987, you were active again in
14 2003 for, it look like about 9 days, and then you
15 went inactive again on the 31st of December 2003.
16 So for the majority of the time that you have
17 been practicing, you have not been an active
18 member of the bar?

19

20 **Presiding Officer:** That is correct.

21

1 **DC:** Is it your understanding that it is not a
2 requirement that you be an active member of the
3 bar?
4
5 **Presiding Officer:** Requirement from whom? Whose
6 requirement?
7
8 **DC:** I am asking you, sir. Is it your requirement
9 that you don't have to be an active member of a
10 state bar in order----
11
12 **Presiding Officer:** For----
13
14 **DC:** ----to serve as a Judge Advocate?
15
16 **Presiding Officer:** Oh, correct.
17
18 **DC:** All right, sir.
19
20 **Presiding Officer:** I have to be licensed to practice in
21 the state. I don't have to be active in the
22 state, and the Judge Advocate General of the Navy
23 determined that I was qualified and he certified

1 me. My status has never changed. The majority
2 of the--there has been a number of times--it has
3 been a thing that reoccurred and unoccurred about
4 the certification that you talked about.

5
6 The time that I was initially licensed to
7 practice and became a Judge Advocate, the state
8 of Idaho would not allow you to be an active
9 member unless you were actually practicing within
10 the state.

11
12 That rule was changed, they told me, when I
13 changed my status with Idaho to an active member,
14 they--I discussed it with the lady who worked in
15 the bar office and it had changed. It hasn't
16 been that many years ago that it changed. But at
17 the time that I queried Headquarters Marine
18 Corps, the Judge Advocate Department, about that
19 specific question because I was concerned as to
20 whether I could be certified as a Judge Advocate
21 if I wasn't active in some state and they said
22 that was not the requirement.

1 I have to be licensed in the state and I am
2 licensed. So as near as I can tell the Judge
3 Advocate of the Navy is or was aware of it when
4 he certified me, and that has never changed. So
5 I believe there is no requirement that you be an
6 active member of the bar in order to be licensed
7 or certified as a Judge Advocate.

8
9 **DC:** All right, sir. Do you see any benefit
10 professionally to being a member of a state bar?

11
12 **Presiding Officer:** I don't understand your question.

13

14 **DC:** Sir, I----

15

16 **Presiding Officer:** I can't be a Judge Advocate if I am not
17 a member of a state bar.

18

19 **DC:** I've been an active member of a state bar since
20 becoming an attorney, and in doing so, I receive
21 publications from the bar, I--I--uh--receive
22 offers for continuing legal education, I can vote
23 in the state bar membership, they make me aware

1 of rule changes--uh--whereas if I was not an
2 active member I wouldn't receive all the same
3 information.

4
5 **Presiding Officer:** I don't know if I receive all the
6 information, but everything that you alluded to,
7 with exception of the voting thing, and I am not
8 sure if I can vote or not as an inactive member.
9 But, specifically with the Idaho Bar, I receive
10 all that information. In fact, recently they
11 have changed it to an Internet operation where
12 you not only get the thing in the mail, but you
13 also get an email monthly on continuing legal
14 education offered through the state, rules
15 changes, things of that nature.

16
17 **DC:** All right, sir, I guess----

18
19 **Presiding Officer:** The big reason why they--the reason
20 that I changed the Idaho from inactive to active
21 for a year was that the ability to learn of
22 judicial vacancies was put only to active
23 members. And I was, at the time, interested in

1 that, so I had my status changed. But in terms
2 of the PMEs and all those types of things, I
3 still receive all of that in the mail.

4
5 In terms of California, again, I am not sure what
6 all they put out for active members, but I still
7 get a bar magazine from them every month, which
8 covers a lot of those things you just addressed.

9
10 **DC:** All right, sir. Well why not be an active member
11 of the bar?

12
13 **Presiding Officer:** Because it cost about \$300 or \$400 more
14 a year.

15
16 **DC:** So just to save money, sir?

17
18 **Presiding Officer:** Yeah.

19
20 **DC:** Sir, I know--I understand that Colonel Brownback
21 is also not an active member of a state bar. Is
22 there something, some kind of agreement that the

1 Presiding Officers are trying to get all of them
2 who are not active members of the state bar?

3

4 **Presiding Officer:** I have no idea what Colonel Brownback's
5 status is or why his is. As you noted, my status
6 has been what it has been for about 23 years.

7

8 **DC:** Okay, sir.

9

10 **Presiding Officer:** And in terms of the selection process.
11 I have no idea what Mr. Altenburg's criteria was
12 when he selected myself or anyone else to be a
13 Presiding Officer. I do remember that there was
14 some discussion, and I haven't seen it anywhere
15 in writing or anywhere else, but the Presiding
16 Officers, they wanted them to be GCM certified,
17 in other word, GCM certified as a military judge.

18

19 **DC:** Roger, sir.

20

21 **Presiding Officer:** GCM certified as a military judge.

22

23 **DC:** Roger.

1

2 **Presiding Officer:** But I have never seen that in writing.

3 That was my understanding. I don't believe the
4 Presidential Military Order or the Military
5 Commission Orders express that requirement
6 anywhere.

7

8 **DC:** All right, sir. So, it is your--basically your
9 position that you are not practicing law without
10 a license but you are lawfully practicing law?

11

12 **Presiding Officer:** Absolutely.

13

14 **DC:** All right, sir. And I think you just mentioned
15 this, but the 9 or 10 days in California that you
16 became active again, was that the time when you
17 were looking at a possible judicial position?

18

19 **Presiding Officer:** No.

20

21 **DC:** What was the reason for the short activation
22 there?

1 **Presiding Officer:** I wanted to make an appearance in
2 California court as an attorney on a personal
3 matter. So, I had my status changed so I was
4 active so I could legally practice in the state
5 of California and appear in a California district
6 court.

7
8 **DC:** I would assume that if you were going to go
9 active for a certain period of time, sir, that
10 would be for a period of year, is that not right?

11
12 **Presiding Officer:** As I recall, California worked on the
13 calendar year basis. I was at the end of the
14 calendar year when I needed to make the
15 appearance. So I called the bar, they sent me
16 some letters by fax, I filled out the letters and
17 sent them back by fax, and I can't remember if I
18 sent them a check or if they charged it to my
19 credit card, but I believe they prorated the bar
20 fee, the difference between the inactive and the
21 active bar fee for that year, so I essentially--I
22 think I paid essentially a month's worth of the
23 active bar fee in order to make that appearance.

1 **DC:** All right, sir.

2

3 **Presiding Officer:** And then at the end of the calendar
4 year, I had my status changed back to inactive,
5 because as I said, it is several--between the two
6 bars it is several hundred dollars a year
7 difference. As it is, I pay a bar fee, a
8 licensing fee, to each state, each year.

9

10 **DC:** All right, sir. Okay, sir. I wanted to ask you
11 some questions concerning experience with cases
12 involving law of war and the Geneva Conventions.
13 And have you heard any cases as a military judge,
14 sir, where that has come up as an issue?

15

16 **Presiding Officer:** Well I think that is in my
17 questionnaire that I gave to the defense. That
18 I presided over two cases at Camp Pendleton that
19 arose out of Iraq and Operation Iraqi Freedom, in
20 which some Marines were charged with violating--
21 they were actually charged with violations of
22 Article 92, I can't remember all the articles,
23 but 92 was one of them, for dereliction of duty

1 as I recall, for not properly caring for a
2 detainee that came into their custody. There
3 were a lot more of them charged.

4

5 Many of those that were charged initially, their
6 charges were dropped as a result of the Article
7 32 investigation. Two of them specifically came
8 to trial and they appeared in front of me. I
9 don't recall specifically what they--they were
10 both convicted of something, but I don't recall
11 what it was.

12

13 They were acquitted of, as I recall, the major
14 charges. The duty that the government was
15 asserting, at least in part, arose from the
16 application of the Geneva Conventions.

17

18 **DC:** All right, sir. And the case you are referring
19 to is U.S. v. Sergeant Pittman and U.S. v. Major
20 Paulus.

21

22 **Presiding Officer:** Correct.

23

1 **DC:** Those were the two cases?

2

3 **Presiding Officer:** And I don't--the last time I checked,
4 and it has been several months. I don't remember
5 when the last time----

6

7 **DC:** All right, sir.

8

9 **Presiding Officer:** ----but the Convening Authority had not
10 taken action in either of those two cases, so I
11 don't know what the status is.

12

13 **DC:** All right, sir. In both the Pittman and the
14 Paulus cases, the government, in that opinion,
15 sought a legal expert to testify as to a service
16 member's legal duties under the Geneva
17 Conventions, and you granted those over the
18 defense objection, and I believe the witnesses
19 were Mr. [REDACTED] and the other name escapes
20 me, I think it was [REDACTED]

21

22 **Presiding Officer:** Rick Lorenz.

23

1 **DC:** Yes, sir.

2

3 **Presiding Officer:** [REDACTED] is a retired Marine Lieutenant
4 Colonel. Colonel [REDACTED] is a retired Marine
5 Colonel who, both of them, teach academically.

6

7 **DC:** All right, sir, and----

8

9 **Presiding Officer:** And only [REDACTED] was called. [REDACTED] was
10 never called. The defense stipulated to his
11 testimony, or stipulated to the issue in some
12 way.

13

14 **DC:** All right, sir, but they were called to provide a
15 legal opinion for the court, correct, sir?

16

17 **Presiding Officer:** I don't remember specifically how it
18 was worded or what the basis was. They were
19 called to address the duty of a service member;
20 whether there was a duty of a service member to
21 properly care for somebody that came into their
22 charge, but whether you--I don't recall that I

1 characterized it as, "provide a legal opinion to
2 the court."

3

4 **DC:** Well they testified as to a duty a serviceman
5 would have under those circumstances?

6

7 **Presiding Officer:** I believe that [REDACTED] did--or [REDACTED]
8 did. [REDACTED] didn't testify.

9

10 **DC:** All right, sir, an expert opinion, and that was
11 relevant in that case; to provide such an expert
12 opinion?

13

14 **Presiding Officer:** It wasn't relevant to--it wasn't
15 necessary to provide an expert opinion, it was
16 necessary for the government, as one of the
17 elements of the offense, to establish that the
18 accused had a duty. The two witnesses were
19 proffered by the government to testify as to the
20 accused's duty to render proper care--to properly
21 care for people that came into their charge.

22

1 You seem to want to characterize it as a "legal
2 opinion." I don't believe that is how I allowed
3 it in or how I characterized it. They could have
4 as easily, I thought it--well, they could have
5 called anyone who had a sufficient basis to talk
6 about whether a United States Marine has a duty
7 of care towards someone who comes into their
8 custody.

9
10 Anytime there is a dereliction of duty charge,
11 you have to--the government has to establish that
12 the individual had a duty.

13
14 The government in this case, in those two cases,
15 chose to call two retired Judge Advocates to
16 testify that they had a duty. They could have
17 called many other people without resorting to a
18 Judge Advocate. That is just who they chose to
19 call. It was their case to try, so they tried
20 it.

1 **DC:** All right, sir, and so, they provided their
2 expert opinion as to what the duty was under the
3 law of war in the Geneva Conventions.

4
5 **Presiding Officer:** I don't recall specifically how it came
6 out. You are asking me to characterize it a
7 certain way. I am not going to characterize it a
8 certain way.

9
10 I don't have the case in front of me. I don't
11 have the record in front of me and as I recall,
12 both cases were non--there was no discharge
13 adjudged in--or whether I take it back, there was
14 a discharge adjudged in the major's case, not in
15 the other case.

16
17 I don't recall the legal rationale that was
18 proffered and I agreed to, or that I used, in
19 allowing that testimony to come in.

20
21 **DC:** All right, sir, as we know each other and I have
22 actually practiced in front of you in court and I
23 have----

1 **Presiding Officer:** Have you?

2

3 **DC:** I have, sir.

4

5 **Presiding Officer:** Okay.

6

7 **DC:** It was U.S. v. Steele, Chief Warrant Officer
8 Steele.

9

10 **Presiding Officer:** I don't recall the case.

11

12 **DC:** And I have, as a Regional Defense Counsel of the
13 Western Region, all of the defense counsel in the
14 Marine Corps in the west fall under me and they
15 have been practicing under you for the last
16 several years. And at times, it seems to be an
17 indication that you are often an emotional judge,
18 that you kind of wear your emotion on your
19 sleeves, and that there has been some comment
20 concerning that.

21

22 **Presiding Officer:** Who? Here?

23

1 **DC:** No, no, no, sir. During conduct of courts-
2 martial out at Camp Pendleton. Are you aware of
3 your emotions sometimes showing during
4 proceedings?

5
6 **Presiding Officer:** Oh, I suppose I would never try to play
7 poker.

8
9 **DC:** All right, sir. Well this concerns us because we
10 don't want a witness to testify and a facial
11 expression from you affecting the other members
12 of the panel. Are you trying to----

13
14 **Presiding Officer:** Do I try to make faces at the panel
15 members to affect their decision-making; no.

16
17 **DC:** All right, sir, and you are not conscious of
18 doing it? I mean, you are not doing this
19 consciously on purpose?

20
21 **Presiding Officer:** I just said I don't try to influence
22 the panel members by making faces at them.

23

1 **DC:** All right, sir, and we are very concerned with
2 that issue coming up, so if we address it to you,
3 if we think you are doing it, and we address it
4 out of the presence of the members, I don't want
5 any ramifications, like I am not making any
6 personal accusations; you can understand that,
7 sir?

8
9 **Presiding Officer:** Yes.

10

11 **DC:** Sir, are you aware that you have a reputation as
12 an activist as a military judge?

13

14 **Presiding Officer:** I am not aware of my reputation. If
15 you are asking me if I consider myself a
16 proactive military judge, I do. I probably ask
17 more questions than most judges. I tend to, if I
18 see an issue that I think needs to be addressed,
19 I tend to, I think, be more inclined to address
20 it than most judges.

21

22 **DC:** Sir, are you aware that there have been defense
23 counsel that have deferred giving an opening

1 statement for fear that you were going to help
2 the prosecution complete their case?
3
4 **Presiding Officer:** I have no idea what defense counsel's
5 strategy is.
6
7 **DC:** Sir, has this ever been brought up on appeal,
8 this issue of your activism? Are you aware of
9 any cases?
10
11 **Presiding Officer:** Not that I am aware of.
12
13 **DC:** Sir, how about--are you aware of the case of U.S.
14 v. Edmunds? It is a 1995 case decided. It is an
15 unpublished decision.
16
17 **Presiding Officer:** I don't know--I am not aware of what
18 you are talking about.
19
20 **DC:** All right, sir. This case was----
21
22 **Presiding Officer:** Was I the judge in the case?
23

1 DC: It says you were, U.S. v. Edmunds----

2

3 **Presiding Officer:** Do you want to show it me?

4

5 DC: Say again, sir.

6

7 **Presiding Officer:** Do you want to show it to me?

8

9 DC: Yes, sir.

10

11 [The DC handed the PO a document.]

12

13 **Presiding Officer:** You've got your----

14

15 DC: I gave the Presiding Officer a copy of U.S. v.

16 Edmunds.

17

18 **Presiding Officer:** It's got your notes on it, Colonel

19 Vokey, is that a problem?

20

21 DC: No problem, if you don't mind.

22

23 [The PO reviewed the document.]

1 **Presiding Officer:** Is this declaration, Exhibit E, is part
2 of it or is it something---

3

4 **DC:** I--I--let me take a look.

5

6 [The DC reviewed the document and removed Exhibit E.]

7

8 **DC:** It is not.

9

10 **Presiding Officer:** Major [REDACTED] do you want to take a
11 look at--is it all right if I show this to Major
12 [REDACTED] as I said, it has your notes on it.

13

14 **DC:** That is fine, sir.

15

16 [The PROS reviewed the document.]

17

18 **Presiding Officer:** While he is looking at that, I intend
19 to recess the court here in 15 minutes for lunch,
20 and we will take an hour and half for lunch.

21

22 **DC:** Recess in 15 minutes, sir?

23

1 **Presiding Officer:** Correct.

2

3 **DC:** Very well.

4

5 **Presiding Officer:** And that is not by way of hurrying you
6 up or anything.

7

8 **DC:** No, sir. I will find a logical stopping point
9 and stop.

10

11 **Presiding Officer:** Okay.

12

13 **DC:** Sir, while the prosecutor was reading that, I
14 have another case I was--another case along the
15 same lines. This is a reported case I was also
16 going to ask you about. I would like to show it
17 to you now. It is United States versus Acosta,
18 49 MJ 14, 1998, the Court of Appeals of the Armed
19 Forces case.

20

21 [The DC showed the PO a copy of the case.]

22

1 **Presiding Officer:** Just for your benefit, while it lists
2 me as the military judge, it also lists Tedd Hess
3 as the military judge. I probably arraigned him.
4 The 89 questions were asked by Hess, not me.

5
6 **DC:** Very well.

7
8 **Presiding Officer:** I was not the trial judge when it went
9 to trial.

10
11 [The PROS reviewed the case.]

12
13 **Presiding Officer:** And I think that case is cited as a
14 teaching point. I didn't realize I was on the
15 header.

16
17 **DC:** And was--uh----

18
19 **Presiding Officer:** Wait, wait. Let Major [REDACTED]
20 finish.

21
22 Have you had a chance to read it?

23

1 **PROS:** Yes, sir.

2

3 **Presiding Officer:** Okay, pass that back to the defense.

4

5 [The PROS did as directed.]

6

7 **Presiding Officer:** As I was saying, on that second case,

8 Colonel Vokey, I probably arraigned him, General

9 Hess, now retired, was the circuit judge at the

10 time, and would have taken the--actually presided

11 over the trial, itself. The 89 questions listed

12 there were not mine. That was not my trial.

13

14 **DC:** All right, sir. U.S. v. Edmunds, in this case,

15 the conviction was upheld, but the issue here was

16 whether the accused was denied a fair trial when

17 yourself, as military judge, had abandoned his

18 proper roles and impartial and neutral arbiter of

19 the case.

20

21 **Presiding Officer:** Yeah, and the court said I had not.

22

1 **DC:** And in that case, sir, you were--found that you
2 were often correcting counsel, telling defense
3 counsel his questions were poorly phrased or
4 confusing. Do you recall doing that?

5
6 **Presiding Officer:** I don't recall the case at all, but I
7 know that on occasion I have--let me back up a
8 step. I don't recall the case at all, I know
9 that there has been at least one occasion where I
10 have arraigned an accused and the judge that
11 tried it, actually presided over the trial,
12 itself, was never listed. It happened with
13 myself and Lieutenant Colonel [REDACTED] who is now
14 retired. That is not to say that that is not my
15 case, and that I said those things; I very well
16 may have.

17
18 As I said, I tend to be, as you used the word,
19 activist judge. If, for example, a member asks a
20 question, I don't simply ask the question the
21 member asked. I will ask questions to put it in
22 context.

23

1 If counsel asks a question that is confused or
2 makes no sense, whether it be prosecution or
3 defense, I will ask them to clarify it and put it
4 in context so that the members have the
5 opportunity to understand the evidence that they
6 are being asked to evaluate.

7
8 **DC:** Yes, sir. But the issue raised in this one was
9 whether you had abandoned your proper role as an
10 impartial and neutral arbiter and that you were
11 basically a partisan advocate for the
12 prosecution. Now the court answered, "No."

13
14 **Presiding Officer:** Correct.

15
16 **DC:** And under the Uniform Code of Military Justice,
17 you have the authority as a military judge to ask
18 questions on your own.

19
20 **Presiding Officer:** Correct.

21
22 **DC:** All right, sir.

23

1 **Presiding Officer:** I also have the authority as the
2 military judge to call witnesses and have other
3 evidence produced on my own volition.

4
5 **DC:** But there are limitations, sir.

6
7 **Presiding Officer:** As do the members in a court-martial.
8 As do the members of the Commission, and I, as
9 the Presiding Officer in these proceedings.

10
11 **DC:** All right, sir, well what are the limits on being
12 an activist judge in calling these witnesses on
13 your own?

14
15 **Presiding Officer:** The general limit, if you want me to
16 get more specific than that, I am not going to,
17 the limit is that you can't become an advocate
18 for either side. You can't abandon your
19 impartial role as a presiding judge or in this
20 case a presiding officer.

21
22 If you want me to be more specific than that, I
23 am not going to. If you want to limit it to a

1 specific fact pattern, I am not going to. If
2 during these proceedings, you believe that I
3 have, then you can do the same thing that the
4 counsel did in the case you are holding there,
5 and that is, address it to me during the conduct
6 of the trial, which is what I gave them the
7 opportunity to do in that case, which they
8 declined to do in that case, and they asked for a
9 limiting instruction, which is what I gave in
10 that case, and that is what the defense asked
11 for.

12

13 **DC:** All right, sir.

14

15 **Presiding Officer:** And I would invite you to do the same
16 thing.

17

18 **DC:** All right, sir. Now, in the court--in deciding,
19 this said that your conduct was not in violation
20 of Article 46 of the Uniform Code of Military
21 Justice. Right, sir? I mean, Article 46 allows
22 you to do those things as a military judge.

23

1 **Presiding Officer:** Okay.

2

3 **DC:** Is that right, sir?

4

5 **Presiding Officer:** I don't have the Code in front of me.

6 If you say it is Article 46, if you want me to go
7 grab the book, we can grab the book and look. I
8 am not sure what the point is.

9

10 **DC:** Well, I am trying to determine whether--does that
11 same concept apply here in the Commissions? Do
12 you feel that you have the same abilities here in
13 the Commissions to be an activist judge, or in
14 this case an activist presiding officer?

15

16 **Presiding Officer:** Well, I have the authority, I believe,
17 in these proceedings, to ensure that both sides
18 have a full and fair trial. I also have the
19 authority to call witnesses and have evidence
20 presented as a member of this proceeding. That
21 is what is laid out in the rules.

22

1 I would tend to think--well, let me back off. I
2 think those are the rules. If you have an issue
3 as to the left and right lateral limits of those
4 rules, you need to make a motion and we will
5 explore it.

6
7 If during the conduct of the trial, as I have
8 said, you think that I have gone beyond what the
9 rules allow, I think it is incumbent upon you to
10 make the appropriate objection, and we will
11 litigate it at the time.

12
13 **DC:** All right, sir. Sir, you said you are still the
14 Circuit Military Judge out at Camp Pendleton--uh--
15 --so that--which would mean that--I am assuming
16 that you are currently still on active duty?

17
18 **Presiding Officer:** Correct.

19
20 **DC:** Are you still handling cases out there?

21
22 **Presiding Officer:** Not really.

23

1 **DC:** When is the last time that you sat as a judge in
2 a court?

3

4 **Presiding Officer:** The O'Neil case.

5

6 **DC:** Back in November of--was November the last time,
7 November of '05?

8

9 **Presiding Officer:** I don't recall specifically that. That
10 sounds about right.

11

12 **DC:** All right, sir, and you are going to be retiring
13 soon?

14

15 **Presiding Officer:** I will retire on 30 June. I have had
16 my continuation on active duty approved by the
17 Commandant of the Marine Corps and I will be
18 continued voluntarily until 30 Jun of '07.

19

20 **DC:** So--for--continued for a 1-year period, sir?

21

22 **Presiding Officer:** Correct.

23

1 **DC:** And what happens at the end of that 1-year
2 period?

3

4 **Presiding Officer:** Either I go--I think the way they
5 termed it in the order is I am on the--I am an
6 inactive member of the retired Marine Corps, or
7 something like that. I will become an active
8 member, unless, for whatever reason, I ask to be
9 continued again or somebody decides I should be
10 continued again. To be continued beyond 1 year
11 requires the Secretary of the Navy's approval.

12

13 **DC:** All right, sir. All right, sir. Do you feel
14 compelled in anyway that we must finish this case
15 by 30 June of 2007, before your 1-year term on--
16 as an--on active duty as a retiree changes?

17

18 **Presiding Officer:** No.

19

20 **DC:** So you will allow the defense enough time to
21 properly investigate, conduct discovery, prepare
22 and develop a defense, and your status, either as

1 active duty or retired won't have any impact on
2 that?

3

4 **Presiding Officer:** My status has no effect on my rulings
5 in any regard.

6

7 **DC:** Very well. All right, sir, how about future
8 plans? Do you have any employment lined up once
9 you finish your job as a presiding officer?

10

11 **Presiding Officer:** No.

12

13 **DC:** Have you made any inquiries, sent out any
14 applications?

15

16 **Presiding Officer:** Yes.

17

18 **DC:** For any government agencies?

19

20 **Presiding Officer:** Yes.

21

22 **DC:** Yes, sir?

23

1 **Presiding Officer:** Yes.

2

3 **DC:** Who with, sir.

4

5 **Presiding Officer:** I applied with the state of Idaho, the

6 state of California, the U.S. Government--perhaps

7 that is a statement on my employability, huh?

8

9 **DC:** Well, sir, looking at those that you applied to;

10 the U.S. Government, what within the U.S.

11 Government have you applied for?

12

13 **Presiding Officer:** I applied for a position with the, what

14 do you call it, CL, Peter Murphy's old office.

15

16 **DC:** Okay, sir, so within the Department of Defense,

17 and specifically, the Marine Corps.

18

19 **Presiding Officer:** Yes. It is the job D.J. Thornly has

20 now.

21

22 **DC:** Very well, sir. Anything else within the U.S.

23 Government, sir?

1

2 **Presiding Officer:** Yeah, I applied for an immigration law
3 judge position. That is pending. I believe that
4 department is a part of the Department of
5 Justice. The immigration law judges are part of
6 the Department of Justice. I applied for that
7 before I learned of the decision my Mr. Altenburg
8 to appoint me as a presiding officer.

9

10 **DC:** All right, sir, and have you discussed with
11 anybody with the Department of Justice the fact
12 you have been appointed a presiding officer or
13 anything about your duties?

14

15 **Presiding Officer:** I updated my resume, because when I
16 supplied them the first resume or application,
17 when I provided the application I indicated that
18 I would retire approximately 1 January of this
19 year. That changed, and so I updated it. I also
20 indicated that I had received the Certificate of
21 Judicial Methodology that I alluded to before. I
22 think I indicated--I did indicate that I had been

1 assigned to this position or appointed to this
2 position, in the update.

3

4 **DC:** All right, sir.

5

6 **Presiding Officer:** And I received a, I don't remember if
7 it was a one or two sentence acknowledgement,
8 that they received my updated application. That
9 is all I have heard upon it.

10

11 I will also indicate, just because you have
12 raised the issue, I am not sure whether it is
13 relevant or not, there are two immigration law
14 judges that I have served with in the past, back
15 when I was on the bench before actually, who are
16 currently serving as immigration law judges up in
17 the Los Angeles area, who I have talked to about
18 the position. One of them is a reserve officer
19 and she is assigned as a trial judge within the
20 Western Judicial Circuit. She is a reserve in
21 the Marine Corps.

22

23 **DC:** Yes, sir, Colonel [REDACTED].

1

2 **Presiding Officer:** Correct.

3

4 **DC:** Sir, have you considered withdrawing your
5 application to the U.S. government or is that
6 still pending?

7

8 **Presiding Officer:** It is pending.

9

10 **DC:** No intent to withdraw that application?

11

12 **Presiding Officer:** I didn't intend to.

13

14 **DC:** Sir, how about----

15

16 **Presiding Officer:** Still, at some point I am still going
17 to become a retired Marine and have to have a
18 job.

19

20 **DC:** Roger. State of Idaho and state of California;
21 what positions are you seeking there?

22

1 **Presiding Officer:** One was as a commissioner of the court,
2 a court commissioner in Riverside County. There
3 were a couple of other attorney positions I
4 applied for. When I say the state of California,
5 California agencies, so I think one was a city
6 attorney, not the city attorney, but on the city
7 attorney's staff for the city of San Diego.

8
9 I can't remember if I--I have applied for several
10 other jobs. I applied for a teaching position
11 with the University of Idaho. A retired--a
12 Marine Major, you probably know him, I don't
13 recall his name, who was actually hired to teach
14 up there for that job.

15
16 **DC:** Yes, sir. All right, sir. It might be a good
17 time now to take a break.

18
19 **Presiding Officer:** I think it would be. All right, until
20 1300, the Commission is in recess.

21
22 *The Commission Hearing Recessed at 1128, 5 April 2006.*

23

1 *The Commissions Hearing was called to order at 1301,*
2 *5 April 2006.*

3

4 **Presiding Officer:** The Commission will come to order. All
5 those present when we recessed are again present.

6

7 Colonel Vokey?

8

9 **DC:** Yes, sir. Sir, this is the first time I'd
10 actually been on the record and I noticed that we
11 have closed-circuit television. Sir, any idea of
12 where this is broadcasting? Is it just in the
13 building?

14

15 **Presiding Officer:** I understand it is broadcasted to
16 several locations within the building. I believe
17 it also broadcast to something called Buckley
18 Hall, which I believe, and I am getting the
19 headshake from somebody back there in the
20 gallery, which I believe is a location that was
21 set up for the media so that they could observe
22 the proceedings and be able to listen to the

1 audio as well as observe. Whatever you're seeing
2 on the monitors is what they are seeing.
3
4 **DC:** All right, sir. Anywhere else in--on Guantanamo
5 that you know of?
6
7 **Presiding Officer:** Not that I know of. I--I also
8 understand there's another system but it doesn't
9 go outside the building, but I am not familiar
10 with it.
11
12 **DC:** All right, sir. And nothing as far as anything
13 that would go off--actually go off the island?
14
15 **Presiding Officer:** I've been told not.
16
17 **DC:** All right.
18
19 **PROS:** Sir, if I can just interrupt real quick. I
20 failed to mention earlier we did have an 8-5
21 session and during that session the defense did
22 object and I just wanted to remind the presiding
23 officer to put that into the record and to

1 summarize the session just to make sure that we
2 have a clear record.

3

4 **Presiding Officer:** I am not going to do that at this
5 point.

6

7 **PROS:** Okay.

8

9 **Presiding Officer:** Well, let me ask you, Colonel Vokey,
10 because I'm thinking you might; do you want to--
11 do you want me to summarize that for the record?

12

13 **DC:** The 8-5 we had earlier this morning, sir?

14

15 **Presiding Officer:** Yes?

16

17 **DC:** I don't see it necessary, sir.

18

19 **Presiding Officer:** I don't--I don't either. With that in
20 mind, I am not--I am going to decline to, Major
21 [REDACTED] but thank you for reminding me.

22

1 **DC:** All right, sir. Going back to the question I
2 asked about the time, the end of December 2003
3 when you became active, and you said that----

4
5 **Presiding Officer:** You're talking about with the
6 California Bar?

7
8 **DC:** With the California Bar, correct, sir. And, uh--
9 --

10
11 **Presiding Officer:** I'm taking--I'll tell you quite
12 frankly, I'm taking your word as to those dates,
13 Colonel Vokey, because I--I know I did it, I
14 don't remember the specific timeframe.

15
16 **DC:** All right, sir. And we are basing this on----

17
18 **Presiding Officer:** I am assuming you pulled something from
19 the California Bar's website.

20
21 **DC:** We did. It was 22 December 2003 to 31 December
22 2003. Now, sir, what exactly did you appear for
23 during this time?

1

2 **Presiding Officer:** It was a personal matter.

3

4 **DC:** Representing----

5

6 **Presiding Officer:** Involving a family member of mine.

7

8 **DC:** All right, sir. Not representing yourself but
9 representing someone else.

10

11 **Presiding Officer:** No, no, no, no. It was a personal,
12 civil matter.

13

14 **DC:** All right, sir. And it was--according to this,
15 you were active for 9 days in 2003. Did you
16 continue any representation after that point?

17

18 **Presiding Officer:** No, it was a single--single court
19 appearance.

20

21 **DC:** And during that time in 2003, you were a military
22 judge at Camp Pendleton?

23

1 **Presiding Officer:** Yes, I believe.

2

3 **DC:** During that timeframe? And are--sir, are you
4 aware of any--any rules of the judicial ethics
5 that would limit what you can do as a practicing
6 attorney while you are also a judge?

7

8 **Presiding Officer:** Well, there are rules. There are,
9 certainly, ethics--I can't recall right now if it
10 is a SECNAV instruction or a JAG instruction,
11 but there is an ethics provision that covers
12 that.

13

14 **DC:** All right, sir. Did you have to ask permission
15 in order to do that?

16

17 **Presiding Officer:** My recollection is--is I did, and that
18 I informed my boss at the time that that's what I
19 was doing.

20

21 **DC:** All right, sir. Other than that, have you ever
22 engaged in the practice of law in California?

23

1 **Presiding Officer:** Well, I've resided in California for a
2 considerable period of my career, and I would
3 consider that my either acting as a trial or
4 defense counsel or providing legal advice to
5 commanders, etcetera, as practicing law. That
6 practice was, however, limited to the federal
7 system and not the California system. So I have
8 never actively, other than the one instance that
9 I alluded to, actively practiced law within the
10 Cali--within California as we--as I described
11 that as within their court system or providing
12 legal advice outside of my responsibilities as a
13 Marine Corps officer.

14
15 **DC:** Sir, a different topic. Do you know if you've
16 ever been reversed on any case? Are you aware?

17
18 **Presiding Officer:** I know I've been reversed, I believe,
19 twice that I'm aware of. Once it was a case
20 where I adjudged a punitive discharge and the
21 appellate court believed I was inappropriately
22 severe, and--I'm--I'm stating that wrong. They
23 felt it was--that the circumstances didn't

1 justify it. The other case was--that was on my
2 first tour as a judge. The other case involved
3 a--my not accepting a guilty plea of a Marine who
4 wanted to plead guilty and the court reversed me
5 on that. There's another case that I mentioned
6 earlier where I am listed as the only judge on
7 the case; it was not my case. I arraigned the
8 individual, Lieutenant Colonel [REDACTED] actually
9 tried the case and the court reversed that case
10 as well. That was not my case.

11

12 **DC:** All right, sir. Do you recall the names of----

13

14 **Presiding Officer:** Those are the only ones that I am aware
15 of.

16

17 **DC:** Do you recall the names of the two cases you were
18 reversed on, sir?

19

20 **Presiding Officer:** No.

21

1 **DC:** You said those are the only two that you are
2 aware of, sir. Could there be more that you are
3 just not aware of?

4
5 **Presiding Officer:** Sure. I've never gone back and done
6 some kind of a search on Lexis Nexis or anything
7 in order to determine whether I've been reversed
8 and--it used to be that they would forward a copy
9 of the opinion when the court took its action to
10 the presiding judge. That was hit and miss
11 whether those ever arrived--reached you. I don't
12 even think they do that anymore.

13
14 **DC:** Roger.

15
16 **Presiding Officer:** And if it's an unpublished opinion,
17 then I'm not even sure if Lexis--I don't--I am
18 not confident whether Lexis would actually bring
19 it out if it is unpublished.

20
21 **DC:** Sir, we were discussing the Acosta case where you
22 stated that, then Colonel [REDACTED] was the actual

1 judge who heard this case, but you also pointed
2 out that Acosta was a teaching point case.

3

4 **Presiding Officer:** Yes. It is taught at the Army JAG
5 School, in particular, in the judge's course.

6

7 **DC:** And is it--is it taught as a means of pointing
8 out what not to do, has a judge gone too far?

9

10 **Presiding Officer:** No, just the opposite. It's--it's--you
11 read the opinion.

12

13 **DC:** I have, sir.

14

15 **Presiding Officer:** The judge was not reversed.

16

17 **DC:** Well, he wasn't reversed, sir, but the--the lower
18 court in that case--uh--did not reverse the case
19 but did find it was error for the judge to deny a
20 39(a) and that there was appearance of
21 partisanship during the questioning of one
22 witness.

23

1 **Presiding Officer:** I don't--as I said, it is taught as a
2 teaching point. The case was not reversed when
3 the judge asked some 89 questions, and I don't
4 recall if it is a witness or throughout the case.
5 I suspect it was of a witness, but, I did not sit
6 down and read it when you handed it to me. I
7 recognized it as not being my case.

8

9 **DC:** Very well, sir.

10

11 **Presiding Officer:** It's also been about 4 years since I
12 attended the judge's course. I think they might
13 also teach it in the--they do a new developments
14 course out of the Army JAG School, a continuing
15 legal education course, and I've attended it; may
16 have been taught there as well.

17

18 **DC:** Sir, I asked you questions about your knowledge
19 of this case; and the January session, looking at
20 the transcript, it appears that you knew very
21 little of this case and I believe you said so on
22 the record, that you hadn't heard very much about
23 it and I--and I--looking back, at this is page 60

1 of the transcript--61. So you'd think you--I
2 think I've seen something that it said his father
3 was killed, I believe, in Pakistan, and that you
4 hadn't learned that much of the case. What other
5 articles have you read since that time, sir?

6

7 **Presiding Officer:** Articles on what subject?

8

9 **DC:** Articles on the Commissions, the Commissions'
10 law, or specifically, Omar Khadr's case.

11

12 **Presiding Officer:** Couldn't tell you. I've read a lot.

13

14 **DC:** And yesterday, sir, you--you were questioned on
15 the same thing, about some of the things you
16 referred to.

17

18 **Presiding Officer:** I was asked about what law review
19 articles and things I've read.

20

21 **DC:** All right, sir. How about law review articles?

22

1 **Presiding Officer:** Well, my answer remains the same. If
2 you attended that or saw the voir dire, Colonel
3 Vokey, you know what I said.

4
5 **DC:** I did not attend, sir.

6
7 **Presiding Officer:** Well I don't recall all the articles.
8 I have read a considerable number of law review
9 articles, some court cases, everything that I
10 have read or come across that I thought even
11 remotely touched on or might touch on, or that
12 counsel might find of interest to the
13 proceedings, I have provided to the Clerk of the
14 Military Commissions and have asked him to upload
15 it to the Commission Library, which everybody who
16 is a member of these Commissions as counsel,
17 either for defense or prosecution, has access to
18 it.

19
20 Which specific article I have uploaded, I don't
21 recall. There have been too many of them. And
22 quite frankly, I am not sure if he has had an
23 opportunity to do so. I would assume he has. I

1 provided them to him when I was here at the last
2 term of court.

3

4 **DC:** Sir, I believe you made reference to a Nuremberg
5 article?

6

7 **Presiding Officer:** Yes, there was one that talked about
8 due process as that was envisioned at Nuremberg.
9 It was a--I believe it appeared in a law review,
10 but I don't remember which one.

11

12 **DC:** All right, sir.

13

14 **Presiding Officer:** I think that was--the title was
15 something like, Due Process at Nuremberg, or,
16 Nuremberg Due Process, or something like that. I
17 say that was the title, when I downloaded it off
18 of Lexis, you have to give it a name, the
19 document, a name when you save it to your hard
20 drive and that may have been just the name that I
21 gave it when I saved it to the hard drive.

22

1 It may not appear under that name either in a
2 Lexis search or as Mr.--the Chief of--the clerk
3 uploaded it to the Commission library, I don't
4 know. But that was the subject. It was looking
5 to due process as it applied to he Nuremberg
6 trials and as I recall, it made the point that
7 due process, as applied at Nuremberg, in some
8 areas the accused had more rights than people
9 enjoyed in a criminal trial in the United States
10 and in other areas, they didn't enjoy the same
11 rights. That seemed to be the point of the
12 article.

13
14 **DC:** How about any books, sir, any books that you have
15 read?

16
17 **Presiding Officer:** I haven't read any books. I did have
18 access and Mr. Fidel, I think is his name, and he
19 is associated with some organization that has
20 assembled a number of articles, of letters, into
21 a--they bound them together; they seem to consist
22 of, in large part, the Military Commission Orders
23 and they solicited comments from lawyers or

1 people with interests in that area and then their
2 comments or articles are included in that and I
3 read some of those. I don't know if you want to
4 characterize that as a book, but it was more of a
5 compilation of information, of articles and
6 letters.

7
8 **DC:** All right, sir. And I think you mentioned
9 reading something about the Hamdan case, and I
10 don't recall exactly what you read concerning
11 that.

12
13 **Presiding Officer:** I don't recall either. I have seen
14 some of the briefs and I believe I have seen some
15 of the opinions of the lower courts. I don't
16 know--I don't recall whether the briefs that I
17 have read were those that were filed at the
18 district court level, or the trial level, or the
19 Supreme Court level. It has been a while since I
20 have read those briefs and I am sure, as you
21 know, there are a boatload of briefs that have
22 been written both for and against Hamdan filed
23 with the various courts.

1

2 **DC:** All right, sir, and correct me if I am wrong,
3 sir, but I think yesterday when asked about
4 newspapers, that you do not subscribe to any
5 newspapers?

6

7 **Presiding Officer:** That is correct.

8

9 **DC:** And your source of news comes from Fox News and
10 that you do not watch CNN. Is that correct, sir?

11

12 **Presiding Officer:** No, that is not correct. I generally
13 watch Fox. I sometimes watch CNN. I also spend
14 time during the day looking at CNN, as well as
15 Fox's websites. I also will periodically will
16 Google something that I am interested in. I use
17 Google News normally.

18

19 The other thing I indicated that I have is there
20 is a service called AVANTGo. It allows you to
21 tap into a news feed, if you will, where the
22 articles are formatted to be read on a handheld
23 device, like a Palm Pilot.

1

2

I have a Palm Life Drive that I use, and so I

3

sync it in the morning, when it is working, and

4

subscribe to Washington Post, New York Times,

5

MSNBC, CNET, a computer geek thing, I don't

6

remember the others off hand, but, the three that

7

I consider--there is a Asia something or another

8

that deals with news in South East Asia.

9

10 **DC:** How about radio, sir? Do you listen to NPR at

11 all?

12

13 **Presiding Officer:** No.

14

15 **DC:** And I recall----

16

17 **Presiding Officer:** I have a SIRIUS radio receiver in my

18 car and I generally will listen to either music

19 on it, well if Fox News was being broadcast, I

20 would often times tap into Fox News because they

21 would feed Fox News over it.

22

1 They had a contract dispute or something and they
2 quit carrying Fox for a while. They are carrying
3 it again. While they weren't carrying Fox I
4 would listen to the CNN feed, and I still
5 sometimes listen to the CNN feed. I drive an
6 hour to work each way.

7
8 You can't listen to commercial radio because it
9 changes three times. You lose the network. You
10 lose the stations because it is by the mountains.

11

12 **DC:** Sir, what about--what articles have you read,
13 specifically against our client, Omar Khadr, or
14 the Khadr family?

15

16 **Presiding Officer:** I have no idea. I don't know what you
17 mean by "against." You said, what articles have
18 I read against your client.

19

20 **DC:** I am sorry. What articles have you read about my
21 client?

22

1 **Presiding Officer:** I have no idea. There has been--once
2 Mr. Ahmad filed a motion concerning the pretrial
3 publicity in this case, specifically, comments
4 being made by the prosecution, I have since made
5 it a point to try to, and I am not saying read
6 everything that comes out, but try to keep--
7 develop a sense of what is being said out there
8 to see if there is a problem that is going to
9 require action to ensure a full and fair trial.

10

11 It has not been an effort to learn about the
12 offenses charged, the defenses that the defense
13 might take or the tactics the prosecution might
14 pursue; it is simply to find out, or stay abreast
15 if I might have an issue that I'm going to have
16 to address to ensure that the members of this
17 Commission that are going to be asked to decide
18 the guilt or innocence and a sentence if they
19 were to convict the accused of something, have
20 been exposed to something that would require
21 action on my part to ensure a full and fair
22 trial.

23

1 **DC:** All right, sir, now wouldn't that be properly
2 brought to your attention by a motion to the
3 court like Mr. Ahmad did last time, where he
4 brought the article to your attention?

5

6 **Presiding Officer:** Well that would----

7

8 **DC:** Or does it necessitate that you--going out and
9 actively seeking cases that concern----

10

11 **Presiding Officer:** That would certainly be one way.

12

13 **DC:** ----Mr. Khadr. Well what about cases--what about
14 news stories that don't necessarily involve the
15 subject of commission?

16

17 **Presiding Officer:** I am not sure what you mean,

18

19 **DC:** Anything that involves Mr. Khadr or Mr. Khadr's
20 family that has nothing to do with this
21 Commission.

22

23 **Presiding Officer:** Have I looked for that?

1

2 **DC:** Sir, if you recall, on 22 February, we had an 8-5
3 conference where I was present in your office for
4 it. And before that conference started you
5 actually handed me a copy to read of a story
6 concerning a civil judgment----

7

8 **Presiding Officer:** I recall that.

9

10 **DC:** ----in a Utah court.

11

12 **Presiding Officer:** I recall that, yes.

13

14 **DC:** And I am asking, why would you read this article
15 if this has nothing to do with the conduct of the
16 attorneys in this----

17

18 **Presiding Officer:** It certainly has to do with pretrial
19 publicity because it specifically addressed Mr.
20 Khadr's involvement with the death of the
21 individual that he is charged with the murder of
22 before this Commission, and there was some

1 dialogue or discussion in there as to the
2 liability of Mr. Khadr.

3
4 One could certainly be concerned that that type
5 of publicity was out there and how it might
6 impact a member of this Commission were he or she
7 to learn of it, that a court had decided that Mr.
8 Khadr was somehow liable or responsible for the
9 death of the Soldier and the injury to the other
10 Soldier.

11

12 **DC:** And pretrial publicity by whom, sir?

13

14 **Presiding Officer:** Pardon me?

15

16 **DC:** You said, "pretrial publicity." By whom?

17

18 **Presiding Officer:** That is publicity about these events
19 that occurs pretrial. I didn't characterize it
20 as by the government or by the defense or anyone
21 else.

22

1 **DC:** Sir, is there anything that you feel would limit
2 your ability to investigate and actively seek
3 information in this case or do you feel that you
4 have no limits, that you can go online and look
5 for as much as you want?

6

7 **Presiding Officer:** I have not explored that. As I
8 indicated earlier, if the defense believes that I
9 have exceeded my authority in some regard, you
10 are certainly free to make a motion so we can
11 explore that legally, factually, and then I will
12 make a ruling.

13

14 **DC:** All right, sir. And you are familiar with the
15 ABA model code of judicial conduct.

16

17 **Presiding Officer:** I am familiar with it. If you are
18 going to ask me a specific question about it, you
19 better hand it to me.

20

21 **DC:** All right, sir. Well Canon three says--Canon
22 three says that I judge must not independently

1 investigate facts in a case and must consider
2 only the evidence presented.

3

4 **Presiding Officer:** Correct.

5

6 **DC:** And although you are not a judge, you are a
7 presiding officer; do you think this is in anyway
8 binding on yourself?

9

10 **Presiding Officer:** As I said, counselor, if you think I
11 have overstepped my bounds and you want to make a
12 motion on that, in this case a challenge, you are
13 certainly free to do so.

14

15 **DC:** Now, sir, there is a--sir, looking for any
16 pretrial publicity but who are you trying to
17 protect from the pretrial publicity?

18

19 **Presiding Officer:** I am trying to protect the integrity of
20 these proceedings and ensure that the parties
21 have a full and fair trial.

22

1 **DC:** All right, sir, and how would a newspaper article
2 affect the full and fair hearings?

3

4 **Presiding Officer:** It is hard to say.

5

6 **DC:** Is this the effect on the members? Is that what
7 you are trying to protect?

8

9 **Presiding Officer:** Generally, I think, yes.

10

11 **DC:** But haven't you already given an order to them to
12 not consider any news articles?

13

14 **Presiding Officer:** Yes.

15

16 **DC:** Any reason to believe that the members are not
17 following that order?

18

19 **Presiding Officer:** No.

20

21 **DC:** Sir, the Military Commission Order Number 1; it
22 talks about the duties of the presiding officer.

23

1 **Presiding Officer:** Where are you referring to
2 specifically?
3
4 **DC:** Paragraph 4(a)(5)(a). Now as I understand----
5
6 **Presiding Officer:** Hold on a minute. All right.
7
8 **DC:** Now as I understand the rules as they sit right
9 now, assuming they are not changed again
10 tomorrow----
11
12 **Presiding Officer:** Lets leave the editorial out, all right
13 counsel?
14
15 **DC:** As I read the rules right now, sir, you are not a
16 voting member of the Commission.
17
18 **Presiding Officer:** That is not accurate.
19
20 **DC:** All right, on the deciding on the facts, that you
21 are not a voting member.
22

1 **Presiding Officer:** On the facts pertaining to guilt or
2 innocence and also on the issue of sentencing, I
3 am not a voting member.

4
5 **DC:** Now on the issue of admissibility of evidence,
6 you can be a voting member.

7
8 **Presiding Officer:** That would be correct.

9
10 **DC:** Whereas if there is a question concerning the
11 admissibility of the evidence, then you will be
12 involved in the vote concerning that
13 admissibility.

14
15 **Presiding Officer:** I will initially decide the
16 admissibility of the evidence. If any member
17 asks to have the entire Commission reconsider it,
18 then the entire Commission, to include myself,
19 would retire, deliberate, vote, and decide
20 whether or not my ruling would stand, or would be
21 overruled or some how modified, by the entire
22 Commission.

23

1 **DC:** All right, sir. Now we want the members, when
2 they are deciding any issue not to be influenced
3 by anything other than the evidence in the case,
4 correct, sir?

5

6 **Presiding Officer:** I don't know. I think I would like
7 them----

8

9 **DC:** We want the members sitting in the box----

10

11 **Presiding Officer:** I would like them to consider the
12 evidence. I would like them to apply to the law
13 to that evidence, and from there, decide the
14 guilt or innocence of this accused, yes.

15

16 **DC:** We want----

17

18 **Presiding Officer:** I would also like them to consider the
19 arguments of counsel. Not that that is evidence,
20 but it is offered to help them normally to
21 understand, interpret the evidence, and apply the
22 law to that evidence.

23

1 **DC:** But they are not to bring in any outside
2 information that was not-----
3
4 **Presiding Officer:** Well everybody that walks in here, to a
5 courtroom, has outside information that they
6 bring with them.
7
8 **DC:** But you have ordered them not to-----
9
10 **Presiding Officer:** No, counsel. Everybody that walks into
11 a courtroom--they don't come from a bubble where
12 they are completely unknowing of anything. They
13 bring things with them.
14
15 **DC:** Common sense, worldly knowledge, knowledge they
16 have when they are detailed to the case?
17
18 **Presiding Officer:** Yes. What we don't want them to do is
19 decide the case based on evidence that is not
20 adduced here in the courtroom.
21
22 **DC:** All right, sir. Now by your actively searching
23 for information concerning my client, when you go

1 into those deliberations with those members on
2 admissibility issues, you are going to bring that
3 information in.

4

5 **Presiding Officer:** No.

6

7 **DC:** You may not specifically reference it, but you
8 are bringing that knowledge in.

9

10 **Presiding Officer:** No, I don't agree. You have assumed, I
11 think, counselor, that one would conclude that
12 what one reads in the newspaper is factually
13 accurate. The---

14

15 **DC:** No, no, sir. I would not say that.

16

17 **Presiding Officer:** The factual things--the things that
18 might be alluded to as fact, are--the purpose in
19 reading it is not to deduce, as I said, the facts
20 of this case or anything about that. It is to
21 see if there is a problem that is going to affect
22 or impact negatively the ability of this

1 Commission to decide your client's case. And
2 also as you--go ahead.

3
4 **DC:** All right, sir. I guess I see that--don't you
5 see that conflicting with the model code of
6 judicial conduct that says a judge must not
7 independently investigate facts in a case and
8 must consider only the evidence presented, when
9 you are actively seeking other information and
10 you were involved in some deliberations with the
11 Commission?

12
13 **Presiding Officer:** No.

14
15 **DC:** All right, sir, and this was also in the
16 preliminary voir dire questions asked of you, but
17 I wanted to go into it further.

18
19 **Presiding Officer:** Do you want to refer me to a question?

20
21 **DC:** Yes, sir. It was page 14 of 14 of RE 29.

22
23 **Presiding Officer:** Question number?

1

2 **DC:** Question C(1), which was asked, do you have any
3 specialized----

4

5 **Presiding Officer:** You said 14 of 14?

6

7 **DC:** That is what it appears on the copy that we
8 printed from the Commissions library.

9

10 **Presiding Officer:** This is of RE 29?

11

12 **DC:** RE 29.

13

14 **Presiding Officer:** That is the last page of the exhibit.

15

16 **DC:** It may be page 10 of 14. We have a 4 scripted on
17 top of it, sir.

18

19 **Presiding Officer:** Well I think the way the exhibit was
20 put together was the original filing was--your
21 original questionnaire was numbered one through
22 something, but when it was combined with the
23 other email----

1

2 **DC:** Roger, sir.

3

4 **Presiding Officer:** ----traffic that accompanied it getting
5 to me and then back to you, then it was
6 renumbered so that there were 14 pages.

7

8 You want me to look at 10 of 14?

9

10 **DC:** Yes, sir.

11

12 **Presiding Officer:** All right, question C what?

13

14 **DC:** C(1).

15

16 **Presiding Officer:** All right.

17

18 **DC:** Asked you, do you have any specialized training
19 or education in the field of international law.
20 I wanted to ask you, you said that you had
21 attended several conferences addressing legal
22 aspects of military operations on the
23 international level, primarily sponsored by

1 PACOM. I wonder if you could elaborate a little
2 bit on that? What were those conferences
3 specifically about?

4
5 **Presiding Officer:** I don't remember exactly. I mean, you
6 are asking me specifically of something that
7 happened 4 and 5 years ago, or 3 or 4----

8
9 **DC:** All right, sir, let----

10

11 **Presiding Officer:** I'm trying to remember the last one I
12 went to. I think it has been 4 years.

13

14 **DC:** International law; are we dealing with law of
15 armed conflict, law of war?

16

17 **Presiding Officer:** Yeah, I think after September 11th,
18 they talked--a lot of discussion about whether or
19 not a nation could act unilaterally, what self-
20 defense meant, things of that nature. But it was
21 on a very high level. I think that was the last
22 one that I attended.

23

1 I am trying to think if it was before or after I
2 moved to the bench. I can't remember now. It
3 was either just before or just after I moved to
4 the bench so it has been a number of years ago.

5
6 I don't recall specific--I mean, these were--have
7 you ever attended that, the MIL OPS Conference?

8
9 **DC:** I have not, sir.

10

11 **Presiding Officer:** Well it is sponsored by the SJA of
12 Pacific Command. They bring in speakers to talk
13 about various subjects; host nation support,
14 peace enforcement operations; they bring
15 representatives from the U.N. to talk about
16 nongovernmental agency support to these types of
17 things.

18

19 **DC:** All right, sir. That answers my question.

20

21 **Presiding Officer:** There was nothing that dealt with the
22 application, as I recall, of the Geneva
23 Conventions or what would constitute a law of war

1 violation or anything of that nature, if that is
2 what you are trying to get at.

3

4 **DC:** Yes, sir. I also want to ask about--you recently
5 attended, as we spoke before, the law of armed
6 conflict course or the law of war course in
7 Charlottesville, Virginia, at the Army JAG
8 School.

9

10 **Presiding Officer:** Right.

11

12 **DC:** How long was that course?

13

14 **Presiding Officer:** Four days.

15

16 **DC:** All right, did you participate in this course by
17 sitting in a room with other students or was it
18 by remote----

19

20 **Presiding Officer:** No, I sat in a room with myself, Mr.
21 Hodges, and Captain O'Toole. Mr. Hodges being
22 the assistant to the Presiding Officer, and
23 Captain O'Toole being another Presiding Officer.

1 We were in a room by ourselves and they had a
2 television hook up so we could watch the
3 presentation.

4

5 **DC:** Colonel Brownback was not there, sir?

6

7 **Presiding Officer:** He was not, nor was Colonel Kohlmann.

8

9 **DC:** Sir, while you were there, were you speaking with
10 any of the instructors one on one?

11

12 **Presiding Officer:** I did not.

13

14 **DC:** Not at all. Did any of the instructors come to
15 talk to the group?

16

17 **Presiding Officer:** I think a couple of them walked by. It
18 wasn't a conversation about the subject, it was a
19 conversation about, as I recall, the logistics
20 whether--because we asked--we wanted to attend,
21 but we didn't want to sit in the auditorium. We
22 wanted to be able to sit amongst ourselves, which
23 we did and the school was very accommodating, and

1 I believe one or more of the instructors stopped
2 by just to see if the accommodations were to our
3 liking.

4

5 **DC:** And you were the only three that were in that
6 room?

7

8 **Presiding Officer:** Yes.

9

10 **DC:** Sir, do you recall a Unites States Army Major who
11 is an instructor at the JAG School providing one
12 of the, yourself or Captain O'Toole, or Mr.
13 Hodges, an opinion that murder by an unprivileged
14 belligerent is not a violation of the law of war.

15

16 **Presiding Officer:** No.

17

18 **DC:** You don't recall hearing that at all?

19

20 **Presiding Officer:** No.

21

1 **DC:** Would there be an opportunity when that was
2 discussed with Captain O'Toole that you didn't
3 know of?

4

5 **Presiding Officer:** Well we weren't in each other's company
6 the whole time, if that is what you mean.

7

8 **DC:** Did that instructor, or any instructor, address
9 any of the issues in this case?

10

11 **Presiding Officer:** Which instructor?

12

13 **DC:** Any instructors from the JAG School.

14

15 **Presiding Officer:** Talk about this case?

16

17 **DC:** Yes, sir.

18

19 **Presiding Officer:** Not that I am aware of.

20

21 **DC:** What about issues of jurisdiction in the case?

22

1 **Presiding Officer:** I don't recall this case being
2 discussed at the JAG School.

3

4 **DC:** And no individual conversations with any
5 instructors concerning jurisdiction of the
6 Commissions?

7

8 **Presiding Officer:** I didn't have conversations with any
9 instructors about any substantive issues. As I
10 said, I don't recall if it was on one occasion
11 that two people came by or if two people came by
12 on different occasions but there was an inquiry
13 made as to the adequacy of the facilities. There
14 was also some discussion with some support staff
15 because we wanted to be able to log onto the
16 computer and send and receive email because we
17 were working on some POMs, but I don't recall any
18 discussion with any instructor.

19

20 **DC:** And the three of you were together during the
21 entire course?

22

1 **Presiding Officer:** Well no we weren't together through the
2 entire course. It was a weeklong course.
3
4 **DC:** And the classes that you attended were the
5 standard classes for the law of war, or were
6 there any other special classes?
7
8 **Presiding Officer:** All right, let me be very candid, all
9 right. A lot of it was really boring and didn't
10 have much application. We turned the volume down
11 and worked on things we thought were important.
12 We didn't see it having any application, so I
13 can't tell you what all the courses were. There
14 seemed to be a lot of stuff on targeting.
15
16 **DC:** No, sir. My question was, was there any special
17 classes just for the three of you that----
18
19 **Presiding Officer:** Oh, no.
20
21 **DC:** ----the rest of the course didn't receive.
22

1 **Presiding Officer:** Oh, no. Not at all. We sat in a room
2 and monitored the class that everybody else saw,
3 only we had the ability to turn them off.
4
5 **DC:** Sir, do you recall the classes that did have
6 application that you were paying attention to?
7
8 **Presiding Officer:** I don't remember the course names.
9
10 **DC:** Well just generally, what were they about, sir?
11
12 **Presiding Officer:** I am not going to go into it.
13
14 **DC:** Is that privileged information?
15
16 **Presiding Officer:** I think so. I mean, that is part of
17 the reason that why we chose to be apart from
18 everyone else, because what we think is important
19 is, I think, privileged, because it may be
20 perceived by somebody as giving a head's up to
21 someone else about where the thing is going and
22 what should happen, or, you know, there is a

1 possibility of some kind of a mixed signal going
2 on. We wanted to avoid that.

3

4 That is why we asked for a room by ourselves,
5 because we didn't want to--anything that we did
6 or said, or if we perked up or something as
7 something was being said, that somebody said,
8 "Oh, gosh, that is what is important at these
9 Commissions." We wanted to avoid that, and I
10 still think that is important.

11

12 **DC:** Okay, sir.

13

14 **Presiding Officer:** What I think is important, what we
15 thought was important in those courses and what
16 we think has application here, I think is
17 privileged; yes.

18

19 **DC:** And it is a, what kind of privilege, sir?

20

21 **Presiding Officer:** I would characterize it as a judicial
22 privilege, if you want to call it that. I know I

1 am not using that term. I full well recognize
2 that I am not sitting here as a military judge.

3

4 **DC:** Sir, I wanted to ask you concerning your
5 selection as a presiding officer. How were you
6 chosen as a presiding officer?

7

8 **Presiding Officer:** I think I answered that in the
9 questionnaire. I don't know.

10

11 **DC:** I mean, it wasn't out the blue, you volunteered,
12 sir?

13

14 **Presiding Officer:** We are re-plowing ground here, Colonel
15 Vokey, but I was asked several years ago if I was
16 interested in acting as a presiding officer.
17 Each service was tasked to provide five nominees.
18 When I say, "each service," the Navy and Marine
19 Corps are treated a separate services for that
20 purpose. I said, "Yes."

21

22 My name along with, I presume four others, were
23 submitted. I was asked to fill out some type of

1 a data sheet that consisted of one page. I
2 believe I was also asked to provide my last two
3 fitness reports. I filled out the data sheet. I
4 sent it in. I declined to provide the two
5 fitness reports. I told them that if someone
6 wanted to see my record, they could go pull it.

7
8 I didn't hear anything for a considerable period
9 of time. And at sometime, and I believe it was
10 around the time the D.C. Circuit Court of Appeals
11 decided, and I believe it was the Hamdan case, I
12 was asked to--if I was still interested and to
13 validate or resubmit that data sheet. I
14 indicated I was and I resubmitted the data sheet.

15
16 Sometime before I was notified that I had been
17 selected by Mr. Altenburg to be a presiding
18 officer, I called the Deputy Director of the
19 Staff Judge Advocate Branch and asked him if
20 there was any chance that I would be asked to
21 participate in these proceedings. He told me,
22 "No." Again, I don't know that he was operating
23 from any particular insider information or if

1 that was just his opinion because he was inside
2 the beltway.

3
4 Based on that, I submitted my letter of
5 retirement asking to retire, I think the actual
6 retirement date was 1 April, but with terminal
7 leave and things, I would have left the service
8 around the 1st of January of this year.

9
10 After doing that, I received a call from Mr.
11 [REDACTED] who indicated that Mr. Altenburg had
12 selected me to be a presiding officer and asked
13 me--I don't remember if he asked me if I was
14 still interested or exactly how the conversation
15 went, but I told him, while I--I told him I would
16 welcome the opportunity to do it, however, I was
17 mandatory to retire the end of June this year and
18 I was going to leave the service around the first
19 of the year.

20
21 He said he would check with Mr. Altenburg. He
22 called me back 2 or 3 days later and indicated
23 that Mr. Altenburg still wanted to appoint me as

1 a presiding officer if I was willing to continue
2 beyond my retirement. I indicated that I was and
3 that I would take the necessary steps with
4 Headquarters, Marine Corps, to have me continued
5 on active duty.

6
7 I don't remember if that was, it seems like that
8 was on a Thursday or a Friday and I believe it
9 was the next week I received either a fax or an
10 email with an attachment indicating, or
11 containing the letter that Mr. Altenburg had
12 signed. A few days later I received the hard
13 copy, original letter in the mail.

14
15 **DC:** All right, sir. You also indicated previously in
16 January that you volunteered for this duty
17 because it was important.

18
19 **Presiding Officer:** Correct.

20

21 **DC:** Why was it important that you volunteered for
22 this duty?

23

1 **Presiding Officer:** It wasn't important that I volunteered,
2 the duty is important. These Commissions are
3 important. That there be a full and fair trial
4 is important. That----

5
6 **DC:** Full and fair hearing, sir. It is not a trial.
7 Right? Correct, sir?

8
9 **Presiding Officer:** That there be a full and fair trial is
10 important. That Mr. Khadr's rights are protected
11 is important. That if there are victims, then
12 their rights are important. That if, the
13 government, the United States Government, and the
14 people it represents have a full and fair trial
15 is important. And I felt that with my experience
16 and background, I could contribute to that.

17
18 **DC:** All right, sir. You are currently--you are still
19 the Circuit Military Judge out there in
20 California, but once the end of June happens and
21 you are retired, who do you work for at that
22 time? What unit do you belong to?

23

1 **Presiding Officer:** I will remain attached to the base and
2 I believe to the judiciary for accounting
3 purposes. I am not retired and I quite frankly
4 haven't explored with the Chief, Trial Judge as
5 to whether or not he will want me to continue to
6 try cases. On the 15th of May of this year, I
7 will turn over with my replacement as the Circuit
8 Military Judge.

9

10 **DC:** All right, sir.

11

12 **Presiding Officer:** I don't know if I answered your
13 question or not.

14

15 **DC:** Partially, sir. So after 15 May, and
16 specifically after June, when you are in your
17 extension, who do you work for? For example, who
18 writes your evaluations, your fitness reports?

19

20 **Presiding Officer:** I am not sure that I receive a fitness
21 report once I am retired. When you retire, you
22 don't have to receive a fitness report. To be

1 honest, I have not fully investigated that. I
2 don't know.

3

4 But the discussion I had with Headquarters Marine
5 Corps and the personnel people, if you will, a
6 chief warrant officer at Headquarters and Service
7 Battalion, is that I will remain on the roles of
8 the battalion, that I will remain attached to
9 Marine Corps Base, Camp Pendleton, and most
10 likely take up an office at the end of the
11 hallway where I will have access to a computer
12 and a telephone.

13

14 The issue as to whether or not I continue to try
15 cases for the Marine Corps, Navy Marine Corps
16 Trial Judiciary, I think is still an open
17 question.

18

19 **DC:** All right, sir. Now in the military we have the
20 concept of administrative control/operational
21 control. It sounds like you are going to be
22 administratively still attached to Marine Corps
23 Base, Camp Pendleton?

1

2 **Presiding Officer:** Correct.

3

4 **DC:** Operationally, who directs you where to go and
5 when? Who will issue you your orders?

6

7 **Presiding Officer:** Near as I can tell, me. I mean, the
8 tasker I have from OMC is to preside over this
9 case, so when I need to go here--come here for a
10 hearing, I pick up the phone or send an email or
11 have my clerk do it. They cut a set of orders
12 and I come out here.

13

14 **DC:** So a tasker from OMC, so----

15

16 **Presiding Officer:** No, no, no. The tasker, the appointing
17 order, when I say, "tasker," I have been
18 appointed as a presiding officer to preside over
19 this case, and at least right now, one other, and
20 the direction is to preside over the case and to
21 bring it to trial. That is also the direction in
22 MCO 1, is the presiding officer is to move the
23 case to trial. So, if you are asking who tells

1 me when I have to go to work and when, at this
2 point, nobody.
3
4 **DC:** All right.
5
6 **Presiding Officer:** Nobody has told me when to come down
7 here, when to set these hearings, what issues to
8 litigate when I am down here. I have received
9 zero direction from OMC or Mr. Altenburg other
10 than what is in the appointing order.
11
12 **DC:** All right, sir, let me ask you this a different
13 way; who will be your chain of command?
14
15 **Presiding Officer:** I don't know. And I realize that is
16 one of the issues that we have attempted to
17 explore and I don't know that there is really an
18 answer.
19
20 Again, I will remain attached at this point to
21 the Navy Marine Corps Trial Judiciary. Whether I
22 try cases or not, I don't know. It will depend
23 on what the Chief Trial Judge wants and directs,

1 if anything. I think--I think they used the
2 term, "detailed," and I believe it is an Army
3 term.

4
5 It is not one that I am familiar with, but they
6 used the term detailed, and there is a--I don't
7 remember if there was a letter or if it was just
8 in an email, but there was some correspondence
9 between OMC and somewhere else in the Pentagon,
10 and I believe it was the General Counsel's office
11 where they have to somehow or another have an
12 administrative connection in order to be able to
13 use their money and appropriation data to cut
14 orders, because my orders coming down here are
15 out of OMC, or out of the General Counsel's
16 office. Somewhere like that, I don't know.

17

18 **DC:** And that is where the detailing comes from as
19 well?

20

21 **Presiding Officer:** What?

22

1 DC: The detailing for you to serve as a presiding
2 officer, or is that maybe from the appointing
3 authority?
4

5 **Presiding Officer:** Well the detailing authority, if you
6 will, I don't think detail--I have been appointed
7 to serve as the presiding officer over this
8 Commission, and by this Commission, I am talking
9 about the U.S. versus Khadr, case; that, in order
10 for them to fund what I do, you know, they gave
11 me a hard drive, a portable drive, and they said
12 in order for them to give me that hard drive,
13 they have to have this detailing thing. There is
14 some correspondence between OMC and somewhere
15 else up in the Pentagon.

16
17 There is no orders cut that I have seen where the
18 Marine Corps cuts me orders and attaches me,
19 which is the term that I am familiar with and you
20 are probably familiar with, attaches me to
21 somebody up in Washington.
22

1 That detailing was actually for--I can't remember
2 if it was for a shorter or longer period of time
3 than my 1-year extension, but it was a different
4 period of time.

5
6 But like I said, I received an email from the
7 administrative chief up there. I don't know if
8 there was a letter attached to it or what, but it
9 was something they needed for accounting
10 purposes.

11
12 But as terms of direction, or orders telling me
13 what to do and when to do it, the only thing that
14 I have received in terms of these Commissions,
15 this or Zahir, is the appointing order signed by
16 Mr. Altenburg where I have been appointed as the
17 Presiding Officer. I have had no discussions
18 with anybody at OMC. I have received no
19 direction from them. I have received no emails
20 from them.

21
22 I have talked to Mr. Altenburg one time when I
23 met him, back in December, and I revealed that in

1 the thing. We introduced ourselves and that was
2 pretty much the extent of our conversations.

3
4 I have met Mr. [REDACTED] I think I have had three
5 conversations with him, two over the phone and
6 one, maybe had four, but I think three
7 conversations, two over the phone and one in
8 person when I met him. The in person one the
9 same time I met Mr. Altenburg.

10
11 Neither Mr. [REDACTED] Mr. Altenburg, nor anyone
12 else has given me any direction about when or how
13 to conduct these proceedings other than what is
14 in the appointing order, in the Military
15 Commission Orders, the Appointing Authority
16 Regulations; in terms of guidance from them, that
17 is the sum total of it. I wouldn't call that
18 guidance; those are directives.

19
20 Quite frankly, I am not sure that anyone knows
21 what the--we haven't done it since World War II,
22 so I am not sure anyone is really sure of the

1 administrative, all of the administrative aspects
2 of it.

3

4 **DC:** All right, sir. Sir, as I mentioned earlier, we
5 had an 8-5 conference on 22 February and at the
6 very beginning of the conference we were
7 discussing my previous request for a continuance.
8 You expressed a desire to move this case quickly.
9 I asked you why. And you said, "Because I said
10 so."

11

12 **Presiding Officer:** I don't think that is exactly the way I
13 put it, but if you want to characterize it that
14 when then, fine.

15

16 **DC:** No, sir, that is exactly the----

17

18 **Presiding Officer:** I think what----

19

20 **DC:** Exactly. "Because I said so."

21

22 **Presiding Officer:** I think I also indicated that I had
23 direction to ensure an expeditious trial in this

1 case and you asked me from whom, and I said, "I
2 believe it was from the Secretary of Defense."
3 Which, you perked up supposing that I had talked
4 to him or something. What I was referring to was
5 MCO Number 1, which in at least two, if not
6 three, places indicates that there should be an
7 expeditious trial in these cases, hearing.

8
9 **DC:** Yes, sir. I think what was discussed in the 8-5
10 was where you said that the President has ordered
11 you to handle these cases expeditiously. I said,
12 "Did you talk to the President?" You said, "No,
13 but it is in his order or another order." Does
14 that sound familiar, sir?

15
16 **Presiding Officer:** Yes. It is in MCO 1, in particular, as
17 in a number of places.

18
19 **DC:** Sir, other than that, is there anyone that is
20 mentioning to you, telling you, that the Khadr
21 case has to go fast?

22

1 **Presiding Officer:** As I indicated, I have received no
2 guidance from anyone other than what is in the,
3 and I will call, The Military Commission Law, the
4 MCOs etcetera, as to how or when I conduct these
5 hearings.

6
7 **DC:** All right, sir, so there is no pressure to move
8 this case along quickly coming from anywhere?

9
10 **Presiding Officer:** Correct.

11
12 **DC:** And--uh--there have been some articles in a
13 newspaper in an article discussing the
14 prosecution's desire to move these cases along
15 quickly, and in case you have read one of those
16 in your active searching for media articles, that
17 won't affect you--your decisions in anyway
18 concerning the scheduling of this case either,
19 sir?

20
21 **Presiding Officer:** I don't recall reading that. I do
22 recall there was a news conference that was held
23 during the last trial term where something about

1 that was mentioned. But, no, to answer you
2 question. It will not in any way impact my
3 decision making in this case.

4

5 **DC:** Okay, sir, then----

6

7 **Presiding Officer:** I'm sorry, the only--the primary--my
8 primary concern is to ensure that there is a full
9 and fair trial, and part of that is bringing the
10 case to trial in an expeditious manner.

11

12 Also, just for your--to make it complete, the
13 Appointing Authority indicated that as soon as
14 practicable, this is in his referral letter,
15 dated 23 November 2005, the Presiding Officer
16 will conduct those sessions he deems appropriate
17 to ensure an expeditious conduct of this trial.
18 And he does refer to it as a trial, not a
19 hearing.

20

21 That is what I was referring to in my office. I
22 think it is also important in any criminal case,
23 anytime someone is charged with a crime, that

1 there be an expeditious trial. To the extent
2 that I can influence that, I intend to.

3

4 **DC:** And you defended murder cases? You defended a
5 capital murder case?

6

7 **Presiding Officer:** Yes.

8

9 **DC:** So it was important that you fully develop all
10 the facts, develop a defense to the case--so you
11 would agree that that is important for the
12 defense to do?

13

14 **Presiding Officer:** Yes. It is also important to bring the
15 case to trial in a timely fashion. It is a
16 balancing between the rights of both parties to
17 get the case brought to trial in a timely
18 fashion.

19

20 **DC:** All right, sir. Sir, I wanted to--you mentioned
21 earlier concerning privileges, you said,
22 "judicial privilege." So, is that what applies

1 here? Is there a judicial privilege with a
2 presiding officer?

3

4 **Presiding Officer:** I used the term, "judicial privilege."

5 That is the closest analogy I can think of to the
6 role of a presiding officer. Yes, I think there
7 is a privilege that exists that allows the
8 presiding officers to discuss and talk amongst
9 themselves, to talk with the assistant to the
10 presiding officer, and that those discussions,
11 and things that come out of them are, in fact,
12 privileged and not subject to discovery by any
13 party.

14

15 **DC:** All right, sir. What is the source of the
16 privilege? Is this--I haven't see a--I'm not
17 sure I have seen a POM or any other regulation
18 about such a privilege.

19

20 **Presiding Officer:** Is it your intent to challenge the
21 privilege, Colonel Vokey?

22

1 **DC:** Possibly, sir, but I don't even know the source
2 of the privilege. Perhaps I will, but--perhaps
3 this is based on the common law privileges that
4 exist?

5
6 **Presiding Officer:** Perhaps if you think there is something
7 you want to discover that is--that I think is
8 protected by privilege then I would ask you to do
9 is file an appropriate motion asking for
10 discovery, cite what legal authority there is
11 that you think entitles you to discover that
12 information, and we will litigate it.

13
14 **DC:** All right, sir. I understand, and we will do
15 that, sir. And just so I know, so I can--in
16 order to write the brief, the judicial privilege
17 that you are using applies to presiding officers?
18 How about the assistant presiding officer?

19
20 **Presiding Officer:** Assistant to the presiding officer, if
21 you look at POM, I believe it is 2, indicates
22 that part of his responsibilities are to provide
23 adjudicative assistance and advice to the

1 presiding officers. In doing so, I think it is
2 essential that there be a privilege that exist to
3 allow the presiding officers to talk with him
4 openly and freely, and to seek his advice,
5 without having the subject of those discussions
6 discoverable by any of the parties or anyone
7 outside the office of the presiding officer.

8

9 **DC:** All right, sir. How about with other military
10 judges, not presiding officers? Is there a
11 privilege there to discuss?

12

13 **Presiding Officer:** I haven't considered that. As I said,
14 if there is something you think you want to
15 discover, file the appropriate motion.

16

17 **DC:** I just--and we will do that, sir, but we are
18 trying to find what the source of the privileges
19 is before we--because we haven't seen it anywhere
20 in the Commission Regulations. There is no
21 Presiding Officer memoranda, nothing else. Is
22 there a source outside the----

23

1 **Presiding Officer:** Colonel Vokey----

2

3 **DC:** ----Commissions Regulations that we need to look

4 to----

5

6 **Presiding Officer:** Colonel Vokey, I will say it a third

7 time. If you think there is something there that

8 you want to discover, file the appropriate

9 motion, we will litigate it, and I will rule.

10

11 **DC:** Very well, sir. All right, sir, now--and you

12 said that Mr. Hodges is covered under this

13 judicial privilege as well?

14

15 **Presiding Officer:** Yes.

16

17 **DC:** All right, sir, and assuming that it is a

18 judicial privilege that you can discuss things

19 with him that are not discoverable to the

20 defense? Is that correct, sir, what you mean by

21 privileged?

22

23 **Presiding Officer:** Yes.

1

2 **DC:** Um, is there a way that we can voir dire Mr.
3 Hodges?

4

5 **Presiding Officer:** No.

6

7 **DC:** And, sir, are you aware that he works for the
8 Department of Homeland Security?

9

10 **Presiding Officer:** I am aware of where his funding or
11 where he is assigned, yes.

12

13 **DC:** He was an instructor at the Federal Law
14 Enforcement Training Center?

15

16 **Presiding Officer:** Correct.

17

18 **DC:** Sir, have you looked into the question of whether
19 there is a possibility that he has trained some
20 of the very witnesses that are going to be in
21 this case, or that he has prepared training
22 material for the various witnesses case?

23

1 **Presiding Officer:** I have no idea of who he has trained.

2 I have no idea who the potential witnesses are in
3 this case.

4

5 **DC:** Does Mr. Hodges know of any potential witnesses?

6

7 **Presiding Officer:** I have no idea.

8

9 **DC:** Sir, if Mr. Hodges, who is under this cloak of
10 judicial privilege that you are claiming has, in
11 fact, had contact directly with witnesses in this
12 case, that would be something we would want to
13 know about. Can we not ask Mr. Hodges these
14 questions?

15

16 **Presiding Officer:** If there are questions that you think
17 you need to ask Mr. Hodges, then you can put them
18 in writing and I will look at them. I would also
19 at the same time suggest that you might ask the
20 witnesses if they know who Mr. Hodges is and if
21 they have ever talked with him, received
22 instruction from him, attended any courses he
23 taught, etcetera.

1

2 **DC:** I will ask that. I will certainly ask that. So
3 our way of finding this information out from Mr.
4 Hodges is asking you the question, sir?

5

6 **Presiding Officer:** If you think it is important to submit
7 questions to Mr. Hodges, I will permit you to
8 submit them to me and then I will address whether
9 or not I will allow them to be submitted to Mr.
10 Hodges. If you think there are potential
11 witnesses that he has instructed or talked to or
12 something else, as I said, you might want to ask
13 the witness.

14

15 **DC:** All right, sir.

16

17 **Presiding Officer:** As I said, I don't know who the
18 witnesses are or what the evidence is in this
19 case.

20

21 **DC:** Sir, does Mr. Hodges communicate with the
22 Appointing Authority? Does he have regular
23 contact? You stated that you don't get any

1 guidance from the Appointing Authority. Does Mr.
2 Hodges, as the Assistant Presiding Officer, get
3 any guidance, or direction, or discussions with
4 the Appointing Authority?

5
6 **Presiding Officer:** As far as I know, he has never had any
7 discussions, substantive discussions, in other
8 words, discussions of the--any particular case or
9 what we do here. I know that he has passed
10 traffic to the Office of the Appointing
11 Authority, for example, logistics requests.

12
13 The POMs when they are now published, before they
14 are published, the Appointing Authority has the
15 opportunity to review them and so they are sent
16 to the, and I believe he actually communicates it
17 through the Office of the Chief Clerk, of the
18 Military Commissions. As far as I know, he has
19 never had any substantive discussions with Mr.
20 Altenburg concerning anything, any case that we
21 are attempting to litigate, either this case or
22 any other case.

23

1 **DC:** And you know that because he has told you he has
2 not, sir, or are you just not aware, of any
3 discussions?
4
5 **Presiding Officer:** I am not aware of any. I have
6 certainly given him no direction to have him pass
7 anything to the appointing authority.
8
9 **DC:** Sir, in prosecution response to----
10
11 **Presiding Officer:** Hold on just a minute. We have been on
12 the record for a little over an hour. I am going
13 to take a break here at quarter after the hour,
14 not yet, quarter after the hour.
15
16 **DC:** Yes.
17
18 **Presiding Officer:** All right, so if you will keep that it
19 mind as you ask me your questions.
20
21 **DC:** Aye-aye, sir. All right, sir, in the prosecution
22 response to one of our motions or an email that
23 followed----

1

2 **Presiding Officer:** Do you have a document that you are
3 looking at that I can look at. Is it a review
4 exhibit?

5

6 **DC:** It would be, sir. It is concerning the motion we
7 are arguing today. It was an email----

8

9 **Presiding Officer:** Which motion? There are two of them.

10

11 **DC:** The abatement motion.

12

13 **Presiding Officer:** It was part of their response or----

14

15 **DC:** It was a request from the prosecution to have
16 additional information considered.

17

18 **Presiding Officer:** All right, that would be--that is not
19 actually, it is not, as I--as we sit here, I do
20 not believe it is a review exhibit. It should
21 be. I am not sure why it is not. It may just
22 not have been attached, but it should be.

23

1 It is an email from Major [REDACTED] of 20 March
2 2006, 1:21 p.m., is that what you are referring
3 to?

4
5 **DC:** That is correct, sir.

6
7 **Presiding Officer:** All right.

8
9 **DC:** In that, the prosecutor asks for you to consider
10 a decision by another presiding officer. Now you
11 did not consider the email that he sent, but my
12 question is----

13
14 **Presiding Officer:** No, I am sorry. He asked to provide a
15 supplemental response to the defense motion to
16 abate, which is RE 79. That is your motion, and
17 that is what I denied, was the opportunity for
18 him to submit, essentially a reply, because it
19 was late. I did not, and have not, prohibited
20 him from arguing that.

21
22 **DC:** Well, sir, and we are trying to grasp what the
23 rules really are, and what law we are trying to

1 grab. One question pops right off my mind is,
2 "Is decisions by other Commissions cases
3 precedent for our case?"
4

5 **Presiding Officer:** I wouldn't consider them, no. I think
6 I answered that in the questionnaire that I
7 provided to the defense. I indicated that they
8 weren't controlling.
9

10 **DC:** Sir, it might be a good time for a break right
11 now.
12

13 **Presiding Officer:** All right. Let's go ahead and be back
14 at 1430. That will give everybody time for a
15 comfort break.
16

17 We are in recess.
18

19 *The Commission Hearing recessed at 1409, 5 April 2006.*
20

21 *The Commission Hearing was called to order at 1429, 5 April*
22 *2006.*
23

1 **Presiding Officer:** Commission will come to order. All
2 those present when we recessed are again present.
3
4 Colonel Vokey.
5
6 **DC:** Sir, again discussing the Assistant Presiding
7 Officer, Mr. Hodges, right after I was asking you
8 some questions concerning that, a note came in
9 from the other room and was handed to you. Is
10 this something that Mr. Hodges passed to you?
11
12 **Presiding Officer:** Somebody passed it to me. I don't know
13 who passed it to me. It was a copy of Presiding
14 Officer Memorandum Number 2, which I have. I
15 have all the memorandums in front me. That is
16 what is in this [pointing to a book in front of
17 him] book.
18
19 **DC:** Sir, prior to the last session, we had received
20 a----
21
22 **Presiding Officer:** I am sorry, you are talking about last
23 month?

1

2 **DC:** In January, sir.

3

4 **Presiding Officer:** Okay, the first session.

5

6 **DC:** We were provided, probably mistakenly, goals for
7 this session that Mr. Hodges had prepared.

8

9 **Presiding Officer:** Correct.

10

11 **DC:** Did Mr. Hodges prepare goals for this session?

12

13 **Presiding Officer:** If he did, it would be privileged and I
14 am not going to respond to your question. I will
15 say, however, that I am the one that sets the
16 goals for any session, if you want to call them
17 goals.

18

19 **DC:** Sir, concerning Mr. Hodges connection to FLETC,
20 the Federal Law Enforcement Training Center, do
21 you know that NCIS and Air Force OSI are partner
22 organizations of FLETC?

23

1 **Presiding Officer:** I have no idea.

2

3 **DC:** Are you aware that NCIS agents train, go through

4 training at the Federal Law Enforcement Training

5 Center.

6

7 **Presiding Officer:** I don't know who FLETC trains.

8

9 **DC:** Well, sir, you preside over a lot of court-

10 martials were we have had NCIS agents testifying

11 and they discuss their background. Don't you

12 recall any of those agents ever testifying and

13 they discuss their background? Don't you recall

14 any of those agents ever testifying that they

15 were trained by the Federal Law Enforcement

16 Training Center?

17

18 **Presiding Officer:** They may have said that. I don't

19 recall that, and I certainly don't know who FLETC

20 trains. I don't know--the first time I have

21 heard that term was probably when Mr. Hodges used

22 that term in our conversation.

23

1 **DC:** Sir, are you----

2

3 **Presiding Officer:** I have never been to FLETC. I don't

4 know what their role is. I don't know who they

5 teach, or don't teach. I don't know what they

6 teach or how they teach it.

7

8 **DC:** All right, sir. Did you know that Mr. Hodges has

9 stated his long-term career aspiration is to

10 remain as a senior instructor at FLETC?

11

12 **Presiding Officer:** I don't know if he stated that. I know

13 that he likes being an instructor. He likes to

14 teach.

15

16 **DC:** Well would a FLETC instructor want to avoid

17 criticism of NCIS, SOPs, manuals, procedures?

18

19 **Presiding Officer:** I don't know. I don't know. You are

20 asking me to speculate on what somebody else

21 might want to do. I won't speculate.

22

23 **DC:** May I approach?

1

2 **Presiding Officer:** For what purpose?

3

4 **DC:** Sir, I am going to make reference to this. This
5 is notes prepared by our team memorializing the
6 8-5 conference that we had on 22 February.

7

8 **Presiding Officer:** Have you shown this to prosecution?

9

10 **DC:** I have not.

11

12 **Presiding Officer:** Show it to him first.

13

14 [The DC did as directed.]

15

16 **PROS:** Sir, this is three pages long, I think we might
17 be better served if we made copies real quick so
18 we could all reference it during these questions.

19

20 **Presiding Officer:** We will take an in-place recess.

21

22 *The Commission Hearing recessed at 1433, 5 April 2006.*

23

1 *The Commission Hearing was called to order at 1441, 5 April*
2 *2006.*

3

4 **Presiding Officer:** The Commission will come to order. All
5 those present when we recessed are again present.

6

7 Colonel Vokey, your, I suppose it is best
8 characterized as a draft summary of the 8-5 and
9 it has been marked as RE 102.

10

11 **DC:** That is correct, sir.

12

13 **Presiding Officer:** Okay.

14

15 **DC:** Sir, concerning the 8-5 conference that we had
16 there on the 22nd of February, you indicated the
17 desire to resolve some of the canned or standard
18 common motions dealing with jurisdiction. What I
19 want to ask, sir, is what exactly did you mean
20 by, "canned"?

21

22 **Presiding Officer:** I think I clarified it at the time and
23 I will clarify that for you again, Colonel Vokey.

1 I think there are certain motions that ask to be
2 raised for these proceedings and I would
3 anticipate counsel intend to raise, and that that
4 goes across all of the Commission trials that are
5 held and----

6

7 **DC:** All right.

8

9 **Presiding Officer:** Just so we are clear on that, that is
10 the term that the President uses, is "trial," not
11 "hearing."

12

13 **DC:** Very well, sir.

14

15 **Presiding Officer:** But I think that what I was indicating
16 to counsel was that, at the time, I wanted to
17 come down here in April, return in June, and that
18 I was encouraging or trying to encourage counsel
19 to make as much use of the time down here as we
20 could by litigating as many motions dealing with
21 the, what we have routinely referred to as, "law
22 motions," as we could.

23

1 I also indicated during the course of that
2 conversation that I would consider every motion
3 that was filed by counsel anew, that I wasn't
4 trying to, in any way, minimize the importance of
5 their motions or their issues, but simply trying
6 to see if we couldn't get through as much as we
7 can during this hearing so when we come back in
8 June, we can focus on other issues that may take
9 more time; that may require the production of
10 witnesses and evidence to litigate, etcetera.

11
12 **DC:** I understand, sir. I did not suggest to mean
13 that that use of the word, "canned," was that it
14 was predetermined outcome. However, when you use
15 the term, "canned or standard motions," you
16 obviously have certain motions in mind if you
17 consider them standard.

18
19 **Presiding Officer:** I don't have any motions in mind
20 particularly. I know that the abatement motion
21 has been filed in more than one case. There have
22 been challenges, I believe, to the discovery in
23 more than one case. Whether counsel, I believe

1 in the--there were four cases that were started
2 earlier prior to them being stayed and I believe
3 that many of the motions that were filed in one
4 case were filed in the other cases.

5
6 Again, that is not to indicate that they are not
7 important in each and every case, it is just that
8 there are issues that lawyers who are looking at
9 it, believe it is necessary to raise in order to
10 protect the interests of their client.

11
12 There is a commonality, I think, to some of the
13 challenges, legal challenges, that go across all
14 of the Commission proceedings and are not unique,
15 necessarily to U.S. versus Khadr.

16
17 **DC:** Well, sir, that is one of the things we are
18 struggling with right now is, nobody knows what
19 law applies, so if there are any other standard
20 motions that you have in mind----

21
22 **Presiding Officer:** I don't have any motions----

23

1 **DC:** We would like to know it.

2

3 **Presiding Officer:** I don't have any motions in mind for
4 you to raise, Colonel Vokey. I sit here and I
5 look at four very experienced attorneys, well
6 educated, and I would think that with all of that
7 horse power, that you all can figure out many
8 challenges, or ways to challenge the legality of
9 these proceedings, to test the legality, to
10 ensure that whatever we do here meets the
11 requirements of the law that is applicable, be
12 that, international law, U.S. Constitutional law,
13 military criminal law, whatever.

14

15 I think it is incumbent upon the counsel to
16 identify those issues and raise those issues so
17 that they can be litigated, and what I was
18 attempting to do, was encourage counsel to do
19 that as early as possible so that we could then,
20 in the June timeframe, focus on things that
21 require perhaps witnesses being brought down,
22 evidence being presented; things that are much
23 more time consuming, arguably, than the legal

1 motions might be, which don't require,
2 necessarily, the presentation, live testimony, or
3 witnesses or other things.

4
5 **DC:** All right, sir, and again, we were already going
6 to litigate the two motions that we are going to
7 litigate today, so when you are referring to
8 canned or standard motions, you were referring to
9 motions in addition to what we already have?

10

11 **Presiding Officer:** No, counsel. I am referring to motions
12 that the attorneys want to bring that would not
13 be a surprise to me, were you to look at what is
14 going on in the other cases, just as you have
15 looked at the voir dire that was conducted in the
16 Zahir case to help formulate your voir dire in
17 this case.

18

19 And that you would look to those other cases and
20 see what issues the other attorneys that have
21 already appeared before these commissions have
22 identified and perhaps, consider whether or not
23 to bring those motions as well, putting your own

1 touch on them, doing your own research, adding
2 your own citations, etcetera, to those motions,
3 so that we can litigate them and get that part
4 behind us.

5
6 And if, in the process of that, there is a
7 determination that these proceedings have to stop
8 for some reason, or we have to change course, we
9 can make that determination and we can continue
10 on or do whatever we need to do. But the sooner
11 we raise those motions, or you raise those
12 motions, and we litigate them, the sooner we know
13 the answer to them.

14
15 **DC:** All right, sir, well, with reference to canned or
16 standard common motions, does that indicate
17 common law motions?

18
19 **Presiding Officer:** Pardon me?

20
21 **DC:** Are we dealing with common law or civil law, when
22 you refer to standard----

23

1 **Presiding Officer:** Move on, Colonel Vokey. Move on.

2

3 **DC:** All right, sir, I wanted to ask you also about--

4 Sir, we are going to do our best to attempt to

5 figure out what kind of motions need to be raised

6 in this case, but from looking at the rules, it

7 appears there are some motions that would be

8 improper to submit to the Presiding Officer.

9

10 If there are--if there are issues which the

11 Presiding Officer cannot answer, it seems that we

12 would not submit them to the Presiding Officer.

13 For example, the Military Commission's Order

14 states that the Presiding Officer does not have

15 the power to dismiss charges. So where would we

16 go with a motion to dismiss a charge? Would that

17 be to the Appointing Authority or do go--take

18 that do you although you don't have the power to

19 decide that issue?

20

21 **Presiding Officer:** If you have a issue you want me to

22 decide, Colonel Vokey, I will repeat myself

23 again. File a motion, brief it, the government

1 will brief it, we can litigate it, and I will
2 decide it.

3

4 There is a provision, I will point out, for
5 interlocutory questions that are to be certified
6 by the Presiding Officer and submitted to the
7 Appointing Authority and that is in Commission
8 Law.

9

10 **DC:** By "Commission Law," sir, are you referring to
11 the Military Commission Orders, the?

12

13 **Presiding Officer:** Regulations, the Military Commission's
14 Instructions, the Presidential Military Order,
15 the POMs, and anything else that applies. We use
16 Commission Law as a shorthand for trying to
17 encapsulate all that.

18

19 **DC:** All right, sir, but the term, "Commission Law,"
20 is not really law, is it?

21

22 **Presiding Officer:** Do you have a question, Colonel Vokey?

23

1 **DC:** Well the term, "Commission Law," was that
2 developed by yourself, or as a Presiding Officer?
3
4 **Presiding Officer:** That's developed as a shorthand. I
5 don't know where it came from originally. I
6 believe it does appear somewhere in either the
7 POMs or MCIs or somewhere, but I am not sure.
8
9 **DC:** All right, sir----
10
11 **Presiding Officer:** But again, Colonel Vokey, it is a
12 shorthand, it is not intended as a term of art or
13 anything else. It is intended as a shorthand to
14 capture the things that apply to this Commission.
15
16 **DC:** All right, sir. So for shorthand, we can use
17 Military Commission's Regulations the same way?
18
19 **Presiding Officer:** I am not sure what you mean?
20
21 **DC:** Instead of calling it law, because you have to
22 agree it is not law, right, sir?
23

1 **Presiding Officer:** No, I don't agree it is not law. If
2 you want to call it, "regulations," then you call
3 it regulations. I am going to refer to it as
4 "Commission Law," and I would hope that you would
5 be able to follow me. Let's move on, please.

6
7 **DC:** All right, sir, again--know where we need to
8 start with some of these motions. I know in the
9 Military Commission Order it says that you don't
10 have the power to dismiss charges. How about a
11 motion for release from confinement? Would that
12 be appropriate to bring up to the Presiding
13 Officer?

14
15 **Presiding Officer:** One way to find out; file a motion.

16
17 **DC:** Sir, does the Presiding Officer have the power to
18 suppress evidence and statements?

19
20 **Presiding Officer:** One way to find out; file a motion.

21

1 **DC:** Wouldn't you agree, sir, it would be a lot easier
2 if there were already rules out there telling us
3 how to practice law?

4
5 **Presiding Officer:** No, I won't.

6
7 **DC:** You would not agree, sir?

8
9 **Presiding Officer:** I would not agree.

10

11 **DC:** You understand, sir, that I am not asking for the
12 answers; the applicability of laws; we need to
13 know a rule book of how to start.

14

15 **Presiding Officer:** The purpose of the voir dire, Colonel
16 Vokey, is to find out if there is a basis to
17 challenge the Presiding Officer, not to get a
18 ruling as to the applicable law in this case, the
19 admissibility of evidence, or anything else. If
20 you have questions that go to my--the propriety
21 of my continuing as a Presiding Officer, I will
22 entertain those questions. If you are going to
23 continue to ask what law applies, how you go

1 about filing motions, how you go about getting
2 things decided, I am not going to allow you ask
3 any more of those questions.

4

5 **DC:** All right, sir, but these questions do go to the
6 heart of the matter.

7

8 **Presiding Officer:** Colonel Vokey, I am not going to argue
9 with you. I will not allow any more questions
10 concerning applicability of different law, how
11 you go about getting decisions on matters,
12 etcetera. If you have questions that go to my
13 fitness to sit here as a presiding officer, I
14 will entertain those questions.

15

16 **DC:** All right, sir, in yesterday's case, you were
17 asked about the U.S. Supreme Court in challenging
18 the Tribunals legitimacy in Hamdan. And make
19 sure I got this right, sir, I believe you said
20 that you had read news accounts of the hearing,
21 had read some legal briefs, and that you would
22 comply with the ruling--of any ruling by the
23 court. Is that correct, sir?

1

2 **Presiding Officer:** I don't know, you are reading it. I
3 did hear or have heard accounts of the Hamdan
4 argument. I have read some briefs in the Hamdan
5 case. I do not know that they pertain to the
6 arguments that were just recently argued in front
7 of the Supreme Court, or whether they pertain to
8 the District Court or the Circuit Court of
9 Appeals cases in Hamdan. It has been a number of
10 months since I read those.

11

12 **DC:** Sir, if the Supreme Court issues an opinion in
13 the case, do you feel obliged to follow the
14 Supreme Court's opinion?

15

16 **Presiding Officer:** If the Supreme Court directs me to do
17 something, I think I am required to do that; yes.

18

19 **DC:** Okay, sir. Several other cases, of the 10 that
20 are charged now, several of the cases have been
21 stayed by judicial order by a district judge, and
22 it appears that the Commissions have been
23 following those orders for a stay. Am I correct?

1

2 **Presiding Officer:** I will take you at your word. I am not
3 familiar with all the other proceedings or
4 trials. I know that there are--you are correct,
5 that there have been some stays. I don't know at
6 what level and by whom they were stayed.

7

8 **DC:** All right, sir.

9

10 **Presiding Officer:** I do know that the appointing authority
11 has the authority to stay the proceeding, so I
12 don't know if those stays that you are referring
13 to, are based on the court order, or are based on
14 action by the Appointing Authority. I don't
15 know. I am not familiar with them. I haven't
16 read the cases.

17

18 **DC:** All right, sir, going back to the Supreme Court
19 deciding Hamdan, that is controlling? If they
20 direct you to do something, you have to follow
21 it, sir?

22

1 **Presiding Officer:** I am going to have to look at what they
2 say, Colonel Vokey. I am not trying to quibble
3 with you about it. You are asking me to tell you
4 how a case or a decision by the Supreme Court
5 that hasn't been issued, how it applies or might
6 apply to this case. I don't know what the
7 Supreme Court is going to say or how they will
8 come out or what the ruling is.

9
10 And until I see that, I can't answer your
11 question. If you are asking me if the Supreme
12 Court tells me to do something, will I comply?

13
14 **DC:** All right, sir.

15
16 **Presiding Officer:** Yes.

17
18 **DC:** Are you familiar with in re Guantanamo detainee
19 case.

20
21 **Presiding Officer:** No.

22

1 **DC:** That is out of the U.S. District Court in the
2 District of Columbia----

3

4 **Presiding Officer:** No.

5

6 **DC:** ----at 355 Federal Sup----

7

8 **PROS:** Sir?

9

10 **DC:** ----2nd, 443.

11

12 **Presiding Officer:** I am not familiar with it.

13

14 **DC:** All right, sir.

15

16 **Presiding Officer:** I am sorry, hold a moment.

17

18 **PROS:** Sir, I would like to object at this point. I
19 think we are getting a long ways from the
20 purposes of voir dire. None of these questions
21 relate to any bias or any evidence that would
22 show that you are not fit to serve at this
23 Commission.

1

2 **Presiding Officer:** I tend to agree, Colonel Vokey. I
3 mean, I'm trying to give you some latitude and
4 you've gone a long ways beyond what--what I think
5 is appropriate. Whether I've heard of a case or
6 not, I--I don't--I'm not--that's not related to
7 this one, I am not seeing the relevance. I will
8 follow the law as I determine what that law is.
9 If you have legal authority that says I am
10 required to take some action, I will take that
11 action, but beyond that, I want to move on. I--I
12 am not interested in these other cases. I don't
13 see----

14

15 **DC:** Our--I want----

16

17 **Presiding Officer:** how they--I don't see how they bear on
18 this and you haven't----

19

20 **DC:** That's my question, sir. Would a case from the
21 U.S. District Court in DC be controlling here as
22 well----

23

1 **Presiding Officer:** I'm not going to answer the----

2

3 **DC:** ----just as the Supreme Court?

4

5 **Presiding Officer:** I'm not going to answer the question.

6 If you want to know if--if a particular case is
7 applicable or a point of law, file a motion and I
8 will decide it based on the briefs and the
9 arguments and the law.

10

11 **DC:** All right, sir. Sir, in 2004, the Department of
12 the Army promulgated a military judge's benchbook
13 for the trial of enemy POWs and the military
14 judge's benchbook for provost courts. Are those
15 things that you would refer to in deciding this
16 case?

17

18 **Presiding Officer:** I don't see the applicability to that
19 to the purpose of voir dire. I've never----

20

21 **DC:** To determine if you would----

22

1 **Presiding Officer:** I've never--I've seen the benchbook,
2 I'm aware of the benchbook. I told counsel
3 yesterday and I believe I reiterated that today,
4 if not, I will, as to applicable law. I think
5 that we will look to international law, I think
6 that we will look to military law, I think that
7 we will look to federal criminal law, I think
8 that we will look at a lot of sources to--to
9 flesh out the procedural rules that govern this
10 proceeding. The purpose or the obligation of
11 counsel is that as they see issues and they need
12 it resolved, they file motions, they brief
13 motions, they cite what they think is appropriate
14 authority, and then I decide it. If counsel have
15 a question as to the--what law is applicable,
16 then--then it's their obligation to file a
17 motion. It is not the appropriate forum during
18 voir dire to try to ascertain what the legal
19 rules are with respect to a particular trial.
20 The purpose of voir dire is to determine if
21 there's a basis to challenge an individual or if
22 that challenge--if that individual should sit as
23 a presiding officer. Whether or not some Army

1 pamphlets that I may or may not be familiar with
2 are applicable here. If you think they are, if
3 you have some issue that you want to raise or
4 cite to them for some purpose, then it's
5 obligatory upon you to file the motion and ask me
6 to apply or at least to determine whether they
7 are applicable.

8

9 **DC:** All right, sir.

10

11 **Presiding Officer:** But to do otherwise, we're sitting here
12 and we're speculating based on not--based on a
13 lack--with a lack of fact, without any definitive
14 purpose as to what issue we're trying to decide
15 or anything else, and I'm not going to engage in
16 that. If you don't have questions that go to my
17 fitness to sit here, then we're going to move on.

18

19 **DC:** Yes, sir. Sir, there is a--an article that
20 points out that there was a----

21

22 **Presiding Officer:** What--what--what do you mean by
23 article? You mean a----

1

2 **DC:** An article. It's an article called, Military
3 Commission Law, by Eugene Fidel, Dwight
4 Sullivan----

5

6 **Presiding Officer:** In like a law--law review article or
7 something?

8

9 **DC:** It is, sir. It is a December 2005 Army Lawyer.
10 And it points out that there is a draft manual
11 for military commissions that has been prepared
12 but not issued. Did you have any involvement in
13 the writing, commenting, drafting, of the manual?

14

15 **Presiding Officer:** I've never seen it.

16

17 **DC:** Are you aware of any manual that's going to come
18 in to us that we----

19

20 **Presiding Officer:** No.

21

22 **DC:** ----can use in the procedures? You've never
23 heard of it?

1

2 **Presiding Officer:** I may have heard of it, but I've never
3 seen it.

4

5 **DC:** And you haven't discussed that with anyone
6 concerning whether it's a good idea, it's a bad
7 idea?

8

9 **Presiding Officer:** No. I think I may have heard it
10 mentioned, but I never discussed it and I never
11 read it, I've never seen it. I don't even know
12 if it exists.

13

14 **DC:** Sir, I have no more questions.

15

16 **Presiding Officer:** Major 

17

18 **PROS:** No questions, sir.

19

20 **Presiding Officer:** Do you have any challenge?

21

22 **PROS:** No, sir.

23

1 **Presiding Officer:** Colonel Vokey?

2

3 **DC:** Yes, sir.

4

5 **Presiding Officer:** Do you have a challenge?

6

7 **DC:** Just a minute, sir [conferring with co-counsel].

8

9 Sir, the defense challenges the presiding officer
10 on two grounds. First, the extensive research
11 and search for media articles, gathering up,
12 looking at other information and evidence of the
13 case. It violates your proper role as impartial
14 and neutral arbiter of the case. That's the
15 first challenge.

16

17 **Presiding Officer:** Your second?

18

19 **DC:** Sir, the second challenge is based on your
20 application for jobs with both the Department of
21 Justice and the Department of Defense. Any jobs,
22 and especially the application for the
23 immigration law judge. And that challenge is

1 based on several different things. First of all,
2 under 8 U.S.C. 1101 B4, the term "immigration
3 judge" means an attorney that the Attorney
4 General appoints----

5

6 **Presiding Officer:** I'm sorry, 1101 what?

7

8 **DC:** 1101 B4.

9

10 **Presiding Officer:** "D" as in dog?

11

12 **DC:** "B" as in boy.

13

14 **Presiding Officer:** Go ahead, please.

15

16 **DC:** Sir, that tells us that----

17

18 **Presiding Officer:** You have that law?

19

20 **DC:** I do, sir. I got notes scribbled on it. I can
21 get a clean one on the break unless you want to
22 look at what I have here, sir.

23

1 **Presiding Officer:** Well, I don't know. You're citing
2 authority but you haven't provided that to me.

3

4 **DC:** No, sir, I don't have an extra copy.

5

6 **Presiding Officer:** All right. Continue, I suppose.

7

8 **DC:** All right, sir. The Attorney General is the one
9 who appoints the administrative judges and what
10 we have here is--and it--we have the same issues
11 in our case here as those in another case.

12

13 **Presiding Officer:** Which case?

14

15 **DC:** As in cases that are before the courts of appeals
16 and the Supreme----

17

18 **Presiding Officer:** I'm--I'm not sure what you're talking
19 about.

20

21 **DC:** Let me--let me start over, sir. The Attorney
22 General has a personal interest in what goes on
23 in the Commissions cases----

1

2 **Presiding Officer:** A personal interest?

3

4 **DC:** A personal interest.

5

6 **Presiding Officer:** As opposed to a professional interest?

7

8 **DC:** That's correct, sir.

9

10 **Presiding Officer:** And how do I know that?

11

12 **DC:** Sir, the Attorney General showed up at the Hamdan
13 argument; he viewed the Hamdan argument. He's
14 the head of the Department of Justice, and he
15 wrote a New York Times op ed piece, November
16 30th, 2001, expressing those opinions.

17

18 **Presiding Officer:** Do I have that in evidence, Counselor?

19

20 **DC:** I will get that for you in evidence, sir. I'll
21 find it, sir. I'll find that in a minute, we'll
22 go into the case law. I have three cases for

1 your consideration, sir. I do have copies of
2 these.

3

4 **Presiding Officer:** Have you got copies for the
5 prosecution?

6

7 **DC:** I--I do, sir [handing documents to the
8 prosecution and to the presiding officer].

9

10 **Presiding Officer:** Do you have those electronically?

11

12 **DC:** I don't, sir, and these are hard copies.

13

14 **Presiding Officer:** Would you make them available to the
15 clerk of the Commission, or, rather, the
16 assistant to the presiding officer
17 electronically?

18

19 **DC:** [No response.]

20

21 **Presiding Officer:** Colonel Vokey, can you make them
22 available to the assistant to the presiding
23 officer electronically?

1

2 **DC:** I think I can figure that out, sir.

3

4 **Presiding Officer:** Okay. Please do that. Do you have any
5 other authority that you are going to provide to
6 the Commission?

7

8 **DC:** Sir, let me find that article. Yes, sir. I also
9 have the--the statute for compensation for
10 immigration judges.

11

12 **Presiding Officer:** And do you have a copy of that for the
13 prosecution and myself?

14

15 **DC:** I don't. I have one copy, sir. I can provide it
16 to you.

17

18 Sir, could we take a brief 5-minute recess? I'll
19 go get those missing documents so you have
20 everything right there in front of you.

21

1 **Presiding Officer:** Why don't you answer my other question?

2 Do you have other legal authority you think

3 you're going to want me to look at?

4

5 **DC:** No, sir.

6

7 **Presiding Officer:** So when we come back in here, then

8 you're going to make your argument and not

9 provide me or cite to other legal authority or

10 legal things?

11

12 **DC:** I'm missing something. What--what are you

13 looking for me to cite?

14

15 **Presiding Officer:** Well, you just handed me about 30 to 40

16 pages of something you're going to argue about.

17 I haven't had the privilege of reading nor has

18 the government counsel had the privilege of

19 reading.

20

21 **DC:** Yes, sir.

22

1 **Presiding Officer:** I would like to read it before I hear
2 your argument.

3

4 **DC:** All right, sir.

5

6 **Presiding Officer:** Is there other things that you're to
7 cite to that I can look at in order to----

8

9 **DC:** No, sir.

10

11 **Presiding Officer:** ----be able to assess the validity of
12 your argument, perhaps ask questions of you?

13

14 **DC:** No, sir. The case that I provided, the two
15 statutes, the one I handed you and then U.S.C.
16 1101 B4.

17

18 **Presiding Officer:** What--what two statutes?

19

20 **DC:** And the newspaper article.

21

22 **Presiding Officer:** I'm sorry. What two statutes?

23

1 **DC:** The one I just handed you, sir.

2

3 **Presiding Officer:** This thing about pay?

4

5 **DC:** Yes, sir, pay and compensation. And then there
6 is the 8 U.S. Code 1101 B4.

7

8 **Presiding Officer:** You haven't handed me the code that--
9 all right.

10

11 **DC:** I have not handed that to you, sir, but if--a
12 break----

13

14 **Presiding Officer:** We're in recess.

15

16 *The Commission Hearing recessed at 1511, 5 April 2006.*

17 *The Commission Hearing was called to order at 1602,*

18 *5 April 2006.*

19

20 **Presiding Officer:** The Commission will come to order. All
21 those present when we recessed are again present.

22

1 A couple of things before I--we proceed. Colonel
2 Vokey, and I'm not inviting additional comment
3 nor will I entertain it, you had asked about the
4 term, "commission law". It comes from POM 1-2,
5 dated 12 August 2004. There's a definition
6 contained in there. If you have any further
7 questions about what that term means and how it
8 is used, I would refer you to that. All right?

9

10 **DC:** [No response.]

11

12 **Presiding Officer:** All right?

13

14 **DC:** Yes, sir.

15

16 **Presiding Officer:** As to the--there were several cases
17 that you provided to myself and the prosecution.
18 The first--let me get them here in order. You
19 cited to U.S.C., Section 1101; you cited to 764
20 F.2d 458, 559; I've got [inaudible] 2d 745; and
21 901 F.2d 1259. Those cases and that statute will
22 not be attached to the record as those are
23 documents that are readily available through the

1 legal research things and so it won't be
2 necessary to attach those. Anyone who wants to
3 look at those may do so by simply getting on the
4 internet.

5
6 As to the article you provided, it's a November
7 30, 2001 article, appeared to be authored by
8 Alberto R. Gonzales, who was then and appears to
9 be counsel to President Bush as opposed as to the
10 Attorney General. I will have that attached to
11 the record. While it's probably available out
12 there, I think it'd be better to attach it to
13 this record as a review exhibit.

14
15 The other thing you provided was a--I'm not sure
16 where it's from, but it has to do with the
17 compensation for immigration law judges, and I
18 presume you're specifically referring to the very
19 last paragraph, it looks like 3(b). I will also
20 have that marked as a review exhibit so just that
21 the record is complete and for ease of reference.
22 It's a one-page document.

1 I believe that was all that you provided or asked
2 me to consider. Is that correct?

3

4 **DC:** It is, sir. We were also trying to get an
5 affidavit from someone who can attest to Alberto
6 Gonzales attending the Hamdan arguments and the
7 fact that he is currently the Attorney General.
8 We haven't gotten that yet. We'd ask that after
9 argument we can add that to the record.

10

11 **Presiding Officer:** That he is the Attorney General?

12

13 **DC:** And that he attended the Hamdan argument.

14

15 **Presiding Officer:** Well, let's--let's handle it this way.

16 I will judicially note, or finally note I think
17 is the term we use in the POM, that Alberto
18 Gonzales is in fact the Attorney General of the
19 United States.

20

21 Major [REDACTED] do you have any objection of my
22 considering for purposes of the argument whether

1 or not the Attorney General attended the Supreme
2 Court arguments in Hamdan?
3
4 **PROS:** I--I-----
5
6 **Presiding Officer:** I mean, I have no knowledge of that.
7
8 **PROS:** I don't know whether he attended or not, sir. I
9 guess I don't have an objection to you
10 considering that for purposes of answering this
11 challenge.
12
13 **Presiding Officer:** All right. For purposes of the
14 argument, I will consider that as a fact without
15 further proof from either side.
16
17 Do you want to continue with your argument,
18 Colonel Vokey?
19
20 **DC:** Yes, sir. Sir, I think I've already stated the
21 reasons concerning your going after as much media
22 information as you possibly can and that
23 conflicts with the ABA Model Code of Judicial

1 Conduct, so I won't address that one any further.
2 But, sir, concerning the issue of your job
3 applications with Department of Justice,
4 Department of Defense, basically, you're seeking-
5 ---

6
7 **Presiding Officer:** Let me--let me clarify because I'm not
8 sure where you're going with the Department of
9 Defense. That occurred and was resolved well
10 before the issue of acting as a presiding officer
11 came up. I'm not sure if you were clear on that.
12 That did not occur after I was notified by Mr.
13 [REDACTED] There is no application pending for
14 anything else going on between me and the
15 Department of Defense other than they pay my
16 salary, like they pay yours every month.

17
18 **DC:** All right, sir. All right, sir. Well, you were
19 seeking employment compensation from the very
20 employers with a vested interest in the outcome
21 of this case before you right now. You're
22 seeking employment as an immigration judge. As a
23 matter of fact, I believe what you said during

1 . voir dire yesterday was, "When I grow up, what do
2 I want to be? A judge."

3
4 **Presiding Officer:** Correct.

5
6 **DC:** And then under statute we've provided, 8 U.S.C.
7 1101 B4, immigration judges are appointed by the
8 Attorney General. That's who you're seeking
9 employment from, the Attorney General. The
10 federal compensation statute that was provided
11 shows that there's compensation for immigration
12 generals, is subject to the control of the
13 Attorney General.

14
15 **Presiding Officer:** Immigration judges?

16
17 **DC:** Immigration judges.

18
19 **Presiding Officer:** You said, "Immigration general."

20
21 **DC:** Immigration judges, sir. So, and currently
22 pending in federal court in Washington DC right
23 now in habeas corpus proceedings is litigation

1 between Omar Khadr and the United States
2 Government, the very same parties who are before
3 you here in these proceedings. And that is
4 pending before the DC circuit. Now, many of the
5 same issues at stake in these Commissions are the
6 same as are at the habeas proceedings in
7 Washington DC right now. So looking at this
8 Commission proceeding and the habeas case, it's
9 the same issues, the same parties.

10

11 **Presiding Officer:** I don't--I don't know that the issues
12 are the same. In fact, I think I was told by
13 the--and I don't recall if it was Mr. Wilson or
14 Mr. Ahmad during the 8-5 that you have referred
15 to, I think--I was told at the 8-5 that you had
16 referred to by either Mr. Ahmad or Mr. Wilson
17 when we were discussing the motions that might be
18 filed for litigation this week, that they weren't
19 necessarily the same nor was the spin on them the
20 same.

21

22 **DC:** But, sir, in the case that I mentioned earlier in
23 voir dire, which was the DC Circuit case of in re

1 Guantanamo detainee cases, the issue here is the
2 applicability of Fifth Amendment, due process.

3

4 **Presiding Officer:** I don't--I don't have that case, I am
5 not familiar with that case. I told you I wasn't
6 familiar with the case.

7

8 **DC:** But, sir, one of the issues pending, one of the
9 biggest issues pending both in the DC Circuit and
10 here in the Commissions proceeding is how much
11 due process my client is entitled to. So that is
12 the same issues and it is the same parties. The
13 Attorney General's office is counsel for the
14 government in the habeas proceedings. As such,
15 the Attorney General is deeply involved in
16 defending the legality and jurisdiction of the
17 military Commission process. So he has an
18 interest in how the issues regarding the legality
19 and the jurisdiction of the commissions are
20 decided here, as in the jurisdiction issues that
21 you referred to as some of the standard briefs.
22 Now, the Attorney General has clearly
23 demonstrated his interest in the outcome of the

1 cases here at Guantanamo in term of the legality
2 of the Commission process. And the two examples
3 are, first is the New York Times article that I
4 provided.

5
6 **Presiding Officer:** Are you talking about the letter, the
7 thing he authored?

8
9 **DC:** The thing he authored, and while he was counsel
10 to the White House. And then was in attendance
11 at the Supreme Court oral argument in Hamdan v.
12 Rumsfeld last week. And in this, he was the
13 White House counsel at the same time the
14 Commission system went into effect. He's been
15 intimately and personally involved in the
16 military Commissions system, its creation and
17 implementation, and has been a prominent defender
18 of the system. A reasonable observer would
19 believe that the ruling upholding the structure
20 of the military Commissions system would please
21 Alberto Gonzales, and a ruling invalidating a
22 portion of the process would displease them.
23 Now, under the Detainee Treatment Act, if my

1 client is found guilty in these proceedings, we
2 have the right to go to the DC Circuit for
3 appeal, where the Attorney General himself and
4 his office is going to argue for the government.
5 And this is the same person that you are seeking
6 employment from. So by seeking employment as an
7 immigration judge while sitting as a presiding
8 officer, you're seeking employment and
9 compensation from counsel that clearly
10 demonstrated interest in the determination of
11 legal issues that are or will come before you as
12 a presiding officer.

13
14 And this is a compromising position. A judge
15 seeking employment from counsel before him must
16 recuse himself. Here, although the Attorney
17 General is not appearing before you, his office
18 is appearing in parallel proceedings that seek to
19 challenge the legality of the Commissions. And,
20 in fact, you were asking for a job from someone
21 who has a vested interest in how you decide the
22 issues before you as a presiding officer. You
23 updated your resume with the Department of

1 Justice to expressly note that you were a
2 presiding officer in a military Commission case.
3 A reasonable observer would believe that this
4 would be of interest to the Department of Justice
5 and to Alberto Gonzales's person.

6
7 Now, I've got in the case law, sir, first and
8 foremost is the PEPSICO decision where Judge
9 Posner, out of the 7th Circuit--in that case we
10 had Judge McMillen. Now, very telling in that
11 case is Judge McMillen, who ultimately decided to
12 sign on with his old law firm and did not pursue
13 the position with the government, Judge Posner
14 said, "It doesn't matter." Now, the appearance
15 of equal justice requires that the judge not be
16 at the point of prospects of employment with one
17 lawyer or all lawyers appearing in a case before
18 him. The dignity and independence of the
19 judiciary are diminished when the judge comes
20 before the lawyers in the case in a role as a
21 client or employment. The public cannot be
22 confident that if he is tried under such
23 conditions will be decided in accordance with the

1 highest traditions of the judiciary. And that's
2 a case, sir, where he withdrew, he did not seek
3 that employment.

4
5 Certainly, in the Monroe Scott versus United
6 States case, where the appellant, Monroe Scott,
7 was also seeking employment and he was engaged in
8 discussions with the United States Department of
9 Justice about employment as an attorney in the
10 executive offices for the United States
11 attorneys. In the same way, you were applying
12 for a job working for the Attorney General as an
13 immigration law judge, and it doesn't matter
14 whether you today withdraw that application or
15 not. It affects the fairness of these
16 proceedings. In order for this to be a full and
17 fair hearing, we ask that you recuse yourself as
18 a presiding officer.

19
20 **Presiding Officer:** Thank you, Colonel Vokey.

21
22 Major [REDACTED]
23

1 **PROS:** Sir, can I just have a minute to confer?

2

3 **DC:** Sir, I know you said you didn't need it, but we

4 do have the affidavit from someone who was

5 present at the argument.

6

7 **PROS:** Sir, I think initially I'd like to talk to--what

8 the standard is here for disqualify--

9 disqualification of a presiding officer. The

10 standard is laid out in Military Commission

11 Instruction Number 8, which specifically

12 references guidance provided by the appointing

13 authority regarding challenges for causes. This

14 is a military Commission; it is not a federal

15 court proceeding. That's the standard that the

16 appointing authority has articulated as the

17 standard that applies to this case. Applying

18 that standard to either of these issues that was

19 brought up by the defense will result in denial

20 of the request to challenge you for cause.

21 Specifically, the first issue they raise is your

22 search for evidence. I think you noted during

23 the voir dire, sir, that the main purpose of

1 this--your internet searches was to make sure
2 that there weren't any articles in the public
3 that might improperly affect potential members in
4 this case. That is not looking for evidence in
5 this case. That is looking for something that
6 might impact a--potential members to be able to
7 decide this case fairly. Your intentions were to
8 decide, to make sure that the accused and the
9 government has a full and fair trial. Those
10 actions were clearly proper and will not justify
11 a challenge for cause.

12
13 On the other issue, sir, these are military
14 Commissions. The authority for military
15 Commission comes from the President to the
16 Secretary of Defense, to the Appointing
17 Authority, to the Presiding Officer. The
18 Attorney General is not part of that chain of
19 command. The Attorney General does not have a
20 role in military Commission. The Attorney
21 General does not have a professional interest or
22 personal interest on what happens to this
23 accused. And for that reason, regardless of what

1 potential employment you might have with that
2 office, they have no interest that could be
3 affected by your decisions here. And for that
4 reason, sir, applying the standard that is
5 applicable in this case, as I believe it was
6 noted in appointing authority decision on
7 challenging for causes in the alBahlul and Hicks
8 case. I have it marked as Review Exhibit 153 in
9 alBahlul, sir. I don't have copies for that,
10 unfortunately, but I can get them made during the
11 next break. I would ask that that standard be
12 applied and applying that standard should result
13 in a denial of the challenge for cause.

14

15 **Presiding Officer:** Thank you.

16

17 Colonel Vokey, anything else?

18

19 **DC:** Sir, I would object to the consideration of
20 anything from alBahlul; that's in a completely
21 separate Commission. The only other thing that I
22 have, sir, is asking that, in case you deny this

1 motion, we ask that the issue be certified to the
2 appointing authority.

3

4 **Presiding Officer:** As an interlocutory question?

5

6 **DC:** Yes, sir.

7

8 **Presiding Officer:** Let's take a 10-minute recess.

9

10 *The Commission Hearing recessed at 1619, 5 April 2006.*

11

12 *The Commission Hearing was called to order at 1633,*

13 *5 April 2006.*

14

15 **Presiding Officer:** The Commission will come to order. All
16 those present when we recessed are again present.

17

18 I've considered the defense challenge for cause
19 using the standard established in MCI Number 8.

20 That challenge is denied. I will provide

21 detailed findings at a later date. If either

22 side desires to submit recommended essential

23 findings or any other matters for my

1 consideration in drafting those findings they may
2 do so. Any submissions will be attached to an
3 email and served on myself and opposing counsel.
4 It must be served on me and opposing counsel by
5 close-of-business on the 19th of April. If
6 either party then desires to reply to the filings
7 of opposing counsel, they may do so by close-of-
8 business within 5 duty days following the 19th.

9

10 Any questions on that from either side?

11

12 **PROS:** No, sir.

13

14 **DC:** Sir, now, certification--is certification going
15 to happen in this case?

16

17 **Presiding Officer:** I will consider that and let you know
18 Colonel Vokey.

19

20 **DC:** All right, sir, because one of the reasons for
21 the certification is that your decision here has
22 a direct financial impact on yourself and
23 that----

1

2 **Presiding Officer:** My decision here doesn't have a direct
3 financial impact on myself.

4

5 **DC:** Sir, if you recuse from this case for this
6 purpose, you recuse from all of Commissions
7 cases, therefore you would--there would be no
8 purpose to extend you on active duty----

9

10 **Presiding Officer:** I've already been----

11

12 **DC:** to serve as a presiding officer.

13

14 **Presiding Officer:** I've already been extended. I have a
15 contract with the Marine Corps for one year. I--
16 my retirement day is when it is. I will continue
17 for 1 year beyond that. At the end of that 1
18 year, what happens is, I suppose, anybody's guess
19 at this point. I--I will not--where I to be--to
20 recuse myself from this and all such proceedings,
21 I will not just be out of a job come 30 June of
22 this year.

23

1 **DC:** Are you sure of that, sir?

2

3 **Presiding Officer:** Yes. I have a piece of paper signed by
4 somebody speaking for the Secretary of the Navy,
5 I believe, or maybe the Commandant of the Marine
6 Corps that says that. I have a set of orders.
7 My orders are not conditioned upon me sitting
8 here as a presiding officer. My orders are that
9 I am continued on active duty.

10

11 **DC:** All right, sir.

12

13 Again, we would--we still request----

14

15 **Presiding Officer:** I understand you request that I certify
16 it as an interlocutory question. I will advise
17 counsel for both sides of my decision on that
18 once I've made it.

19

20 **DC:** Very well, sir.

21

22 **Presiding Officer:** What I would like to do is go ahead and
23 take the evening recess, an hour and a half, I

1 realize that's a little bit early but I think
2 it'd work better. When we come back, we can take
3 up the--I believe we have two other motions. We
4 will take those two motions up when we get back.
5 I'd like everybody to be back at 1900; I believe
6 that's an hour and a half. I've done my math
7 right?

8

9 **DC:** I believe 1800, sir.

10

11 **Presiding Officer:** 1800--no--

12

13 **DC:** Yes. It is 1630 right now----

14

15 **Presiding Officer:** You're right, you're right. 1800,
16 please. We're in recess.

17

18 *The Commission Hearing recessed at 1636, 5 April 2006.*

19

20 *The Commission Hearing was called to order at 1806,*
21 *5 April 2006.*

22

1 **Presiding Officer:** The Commission will come to order. All
2 of those present when we recessed are again
3 present.

4
5 I want to go ahead and take up the abatement
6 motion next.

7
8 **PROS:** Sir, if I can interrupt briefly. I failed to
9 mention earlier we have a new court reporter
10 from--that we didn't have in the last session in
11 January.

12
13 **Presiding Officer:** That's okay. I mentioned it.

14
15 **PROS:** Okay, sir.

16
17 **Presiding Officer:** I also mentioned he had been sworn.

18
19 **PROS:** In this case, sir, or----okay, sir.

20
21 **Presiding Officer:** Major [REDACTED] if in the future you
22 think I've missed something, please feel free to
23 remind me.

1

2 **PROS:** All right, sir.

3

4 **Presiding Officer:** All right. The defense brief was

5 originally marked and submitted back before our

6 first session, and was remarked and is now RE 79,

7 and that was as a result of our discussions at

8 the 8-5 when the defense indicated they wanted to

9 go ahead and litigate this abatement motion. The

10 government's response is marked as Review Exhibit

11 85.

12

13 Defense, is there any evidence you want to offer?

14 Who's got this, Captain Merriam, do you have

15 this?

16

17 **ADC:** I'm sorry. Yes, sir, I will be arguing this one.

18

19 **Presiding Officer:** Do you have any evidence that you want

20 to offer on this?

21

22 **ADC:** No, sir.

23

1 **Presiding Officer:** Government, is there any evidence the
2 government wants to offer?

3
4 **PROS:** No, sir.

5
6 **Presiding Officer:** Captain Merriam, do you want to offer
7 any additional argument? When I say additional,
8 I would ask that you not repeat the argument that
9 is contained in your brief. And when I say that,
10 I would ask you to clarify and address two points
11 for me. The first is that you've indicated--let
12 me find this thing. You've indicated in the
13 fourth paragraph under burden of proof and
14 persuasion that you believe that this motion is
15 jurisdictional, and I would ask you to
16 specifically address that. Also, while I
17 indicated to the government I would not allow
18 them to attach additional matters or additional
19 briefs that addresses the Detainee Treatment Act
20 and its possible implications on what we are
21 doing here today, specifically this abatement
22 motion, I would ask you to address that.

23

1 **ADC:** Yes, sir. I will--I'll take that second one
2 first. With respect to the Detainee Treatment
3 Act, it's clearly been passed and the defense
4 does not see how we can in good faith proceed and
5 discuss the issues in this abatement motion while
6 ignoring the Detainee Treatment Act and its
7 existence. So we have no objection to the
8 government arguing that and then we intend to--to
9 also argue that.

10

11 With respect to the burden of persuasion, sir,
12 the defense has asserted----

13

14 **Presiding Officer:** But wait a minute. I'm sorry. Are you
15 going to actually argue it now, about----

16

17 **ADC:** Well, sir, I----

18

19 **Presiding Officer:** About the Detainee Treatment Act? Are
20 you going to address its implications now or--
21 because that's what I was asking you to do.

22

1 **ADC:** Yes, sir. We do intend to do that, but in some
2 degree that depends on who does have the burden
3 of persuasion in this case, in this--with respect
4 to this motion. We submit that it's the
5 government's burden and that they should argue--
6 argue first.

7
8 **Presiding Officer:** Well, you've made the motion and I've
9 asked you to argue first, so I'm going to ask you
10 to address that, please.

11
12 **ADC:** Okay, sir.

13
14 **Presiding Officer:** And whatever argument you want to make
15 on this motion, I would ask you to make it now.
16 Again, keeping in mind my directive to not
17 regurgitate what's already contained in your
18 briefs because I have read the briefs.

19
20 **ADC:** Yes, sir. Sir, this is a jurisdictional motion.
21 This is not a motion--this motion is not an
22 attack on procedure or the procedures that will
23 be applied during the conduct of the trial by

1 Commission. This motion is a direct attack on
2 the constitution of the Commission itself,
3 whether it is in fact a properly constituted
4 tribunal. The government has argued in the
5 response briefs that the Hamdan decision somehow
6 should lead you to conclude that this is in fact
7 a procedural motion and not jurisdictional, and I
8 would like to take a moment to address that. I
9 do have copies of the Hamdan decision here--I'm
10 sorry, the Hamdan decision. I'm not sure the
11 government--I'm assuming the government has it,
12 it's in their brief.

13

14 **Presiding Officer:** Are you talking about the DC Circuit
15 court opinion----

16

17 **ADC:** Yes, sir.

18

19 **Presiding Officer:** ----district circuit court?

20

21 **ADC:** The DC Circuit case, sir.

22

1 **Presiding Officer:** Yes, and I don't think the Supreme

2 Court's ruled yet.

3

4 **ADC:** That's correct, sir. Sir, do you require a copy

5 of the Hamdan DC Circuit case?

6

7 **Presiding Officer:** If you want me to--if you have a copy

8 there and you want me to consider it, it would be

9 helpful.

10

11 [The ADC handed documents to the PO.]

12

13 **Presiding Officer:** All right. And since this is a matter

14 contained in the public body at law it won't be

15 necessary to attach a copy to the record, and it

16 is 367 US Appellate DC 265, 415 F.3d 33.

17

18 Continue, please.

19

20 **ADC:** Sir, the government cites some particular

21 language in that Hamdan decision, and it is found

22 at--at 42 in this case, at page 42. And there

23 the court said, "The issue thus raised is not

1 whether the Commission may try him, but rather
2 how the Commission may try him." But what the
3 government doesn't address in their brief is that
4 the issue before the court----

5

6 **Presiding Officer:** I'm sorry. When you say, "42." Page
7 42 of what?

8

9 **ADC:** Of the Hamdan decision, sir. It is at 415 F.3d
10 33, and I'm looking at page 42. I'm sorry----

11

12 **Presiding Officer:** My pages are numbered totally
13 different, then. I got pages 8, 9, 10.

14

15 **ADC:** Okay, sir. Page 9 of the printed version that
16 you're looking at, in the left-hand column, about
17 a third of the way down from the top of the page.

18

19 **Presiding Officer:** Left-hand column?

20

21 **ADC:** Yes, sir, the left-hand column, just beneath the
22 25, page 25 indication. That's the language that
23 the government cites for their contention that

1 this is not a jurisdictional motion. But what
2 they don't mention is the fact that the issue
3 before Hamdan that is being discussed in that
4 portion of the opinion is the fact that Hamdan
5 challenged due process requirements, the due
6 process--or the lack of due process, within the
7 Commission proceedings and within the Commission
8 instructions and orders as a whole. This motion
9 does not do that, sir. This motion alleges that,
10 in fact, this Commission is not yet in existence,
11 has not yet been properly constituted because the
12 President's military order tells us what
13 constitutes--how--how--I'm sorry, it tells us
14 that the accused will be tried by the Commission
15 sitting as triers of law and fact, and the
16 defense motion contends that that requires the
17 presence of both the presiding officer and the
18 other members, which are also referenced in the
19 President's military order. So to the extent
20 that the government relies on this portion of the
21 Hamdan opinion, that is not in fact what the
22 Hamdan decision addresses. Again, this is an
23 attack on the composition of the tribunal. And,

1 in fact, we're saying the other members aren't
2 here, so we don't have a tribunal yet, and that
3 is a jurisdictional question. And that's why the
4 burden of persuasion is on the government and the
5 quantum is, by preponderance of the evidence, to
6 show that jurisdiction in fact exists.

7
8 So fundamentally, this motion is about a conflict
9 between the two most basic rules that apply in
10 this ongoing criminal proceeding, and it's how
11 those inconsistencies and that how that conflict
12 should be interpreted that's an issue in this
13 motion. So I'd like to focus on the government
14 response and the argument they advance in it, as
15 well as the Detainee Treatment Act and what the
16 prosecutor has outlined in his email, and which
17 we acknowledge we are going to address today.

18

19 **Presiding Officer:** Well--well----

20

21 **ADC:** And by that----

22

1 **Presiding Officer:** Well, before you do that, if you're
2 going to--as I said, I don't believe is--an email
3 of my response to that is an RE, but you're
4 asking that I--and I said it probably should have
5 been and I think it's an oversight that it is
6 not, but you want me to consider what the
7 prosecution basically was asking to be able to
8 provide additional briefing to the Commission
9 on----

10

11 **ADC:** Yes, sir.

12

13 **Presiding Officer:** ----concerning this issue.

14

15 **ADC:** Yes, sir. I mean, I will go ahead and outline
16 what I took away from that argument. I am sure
17 the government will advance the argument. But
18 essentially, the government argues that the
19 detainee has been enacted and that----

20

21 **Presiding Officer:** In the Detainee Treatment Act.

22

1 **ADC:** In the Detainee Treatment--I'm sorry. The
2 Detainee Treatment Act has been enacted and in
3 that act Congress expressly acknowledged the
4 existence of Military Commission Order Number 1,
5 which is what the defense contends is
6 inconsistent with the President's military order.
7 And that since the President did sign the
8 Detainee Treatment Act, this somehow implies that
9 both branches of the government have now
10 acknowledge and approved of Military Commission
11 Order Number 1. Let's assume first, for the
12 purposes of argument, that that's true and that
13 this is an endorsement by Congress and the
14 President of the contents of Military Commission
15 Order Number 1. That order contains the
16 construction clause that says, "Anything
17 inconsistent in the Military Commission Orders
18 and the President's military order will be
19 resolved in favor of the President's military
20 order." So to the extent that Congress and the
21 President have given that affirmation to the
22 Detainee Treatment Act and Military Commission
23 Order Number 1, that doesn't resolve the

1 inconsistency because that very order contains
2 the construction clause and tells us how we are
3 to deal with inconsistencies. So in that sense,
4 it's a nullity, it's a wash. They say, "Yes, we
5 approve of Military Commission Order Number 1,"
6 but it's just as possible to say that when the
7 President looks at Military Commission Order
8 Number 1 he has no problem endorsing it because
9 he knows that the contents within it are
10 guaranteed, that his will as outlined in the
11 President's Military Order, will always control
12 and resolve the inconsistencies.

13

14 Secondly, it's worth pointing out that the
15 government asserts that by signing this act, that
16 the Congress and the President have expressly
17 adopted Military Commission Order Number 1. It's
18 a very, very cursory reference in the Detainee
19 Treatment Act to Military Commission Order Number
20 1. I do not--the Detainee Treatment Act does not
21 address its substance, its contents, and does not
22 take the sort of steps you might imagine that a
23 legislative body in particular would take if they

1 intended to acknowledge the existence of a
2 tribunal that I don't think anyone can argue is
3 not a--a wholesale change to the due process laws
4 and the way we have been practicing criminal law
5 for the last 60 years. It's been sixty-some
6 years since we had a military Commission. One
7 would presume that if Congress was intending to
8 expressly endorse the procedures established by
9 the President and the Secretary of Defense, in
10 this order, they would have addressed that at
11 some length because it is such a dramatic change,
12 it is such a weighty decision. Instead, all we
13 have is a very, very cursory reference to the
14 order in two lines of the Detainee Treatment Act.

15
16 So with that in mind, sir, we're still left with
17 this inconsistency between the MCO and the
18 President's military order, because even if
19 Congress and the President have adopted the
20 military Commission order--

21
22 **Presiding Officer:** I think the problem is your microphone
23 keeps going off because you talk rather softly.

1 I can hear you fine, but there are a lot of other
2 people that are interested that aren't sitting in
3 the room, primarily the press, and are unable to
4 hear you. You might want to hold the microphone
5 closer----

6
7 **ADC:** Certainly, sir.

8
9 **Presiding Officer:** ----because if that little red light
10 that's on your microphone right on the base of
11 the fuzzy part isn't on, they're not hearing you.

12
13 **ADC:** Okay. Is this picking me up now?

14
15 **Presiding Officer:** Well, the light's on so it's picking
16 you up. I can--like I said, I can hear you fine
17 but you need--you might want to, just like I
18 said, stand a little bit closer so other people
19 can--so it stays on and they can hear you.

20
21 **ADC:** Certainly, sir.

22

1 We're still left with an inconsistency between
2 the President's military order and MCO Number 1.
3 The language the President selected is not
4 subject to some fair interpretation or some
5 application of a--that reasonable minds can
6 differ on a standard, as the government suggests
7 we should do in their brief. The military
8 Commission said it's triers, plural, of law and
9 fact. Those are words, which I presume the
10 President carefully selected. Again, we have to
11 imagine the Commander in Chief, the Chief
12 Executive of the United States, in a global war
13 on terror and in reaction to the events of 911,
14 taking an enormous and weighty decision to
15 fundamentally alter the due process rights and
16 the criminal procedure that's going to apply. He
17 had to know that this was an enormous step. He
18 apparently reached back to World War II to
19 determine what language to use in order to take
20 this step. We have to assume that he meant what
21 he said; we have to assume that, sir. If we
22 don't, then we've got to question so much more
23 about this military Commissions process.

1

2 **Presiding Officer:** Well, you assume that he meant what he
3 said and his Secretary of Defense said something
4 that contradicted that. Would we also have to
5 assume that that same Commander in Chief who
6 weight--considered that weighty decision would
7 also tell his subordinate, his Secretary of
8 Defense, "No, Mr. Secretary, you got it wrong.
9 When I said this, this is what I meant. Fix your
10 Military Commission Order Number 1" and not rely
11 on this process going forward in contravention or
12 contradiction to what he said he wanted?

13

14 **ADC:** Sir, that is a possible--that's something we
15 might expect. It depends entirely on how much we
16 know about what the president knows about the
17 military Commissions process, and we don't have
18 that information. All we know for certain is
19 that----

20

21 **ADC:** Well, you--you just asserted in your argument
22 that the President didn't have nor Congress had
23 to act because they knew that in MCO 1 there was

1 a provision that said you have to defer to the
2 Presidential military order if there was a
3 conflict.

4
5 **ADC:** That's right, sir.

6
7 **Presiding Officer:** So you said that he was in fact, both
8 he and Congress were aware of the content of MCO
9 1, so it's--isn't it equally possible that if he
10 was aware of it as you said, knowing that there
11 was this deferral to the PMO contained in the
12 MCO, that he would have said to his Secretary of
13 Defense, "You got it wrong. Fix it. I said what
14 I said and I meant what I said. Do what I said.
15 Fix your MCO 1." Rather than waiting for it to
16 have to come down here for some litigation or
17 something else, he would have corrected his
18 Secretary of Defense.

19
20 **ADC:** Yes, sir, it is possible. It is equally possible
21 that he, again, looking at Military Commission
22 Order Number 1, says, "Hey, the Secretary of
23 Defense has a clause in there that guarantees

1 that my will ultimately will prevail if there is
2 a conflict." He may also be waiting on this
3 issue to work its way through the military
4 Commissions process and get ruled on by presiding
5 officers on the theory that, "Hey, the protection
6 is there, it's built in, and now the tribunal can
7 sort it out because I provided in my guidance to
8 the Secretary of Defense and in my President's
9 military order all the information that is
10 required to reach a resolution on this issue."
11 So, certainly--certainly, what you propose is a
12 hypothesis and is a reasonable one, but it's not--
13 -it's not a 100 percent clear that that's what's
14 happened here. If the President wanted to make
15 that clear, he can readdress this issue, sir, and
16 that's something that can be done tomorrow, issue
17 a new President's military order. His
18 reluctance to do so could imply that he's happy
19 with the proceedings as they are going forward--
20 under the rules they are going forward under, or
21 it could imply that he's confident this issue is
22 going to be resolved in favor of his order

1 because that's what all of the subsequent orders
2 say should be done.

3
4 So the next question that the defense puts to
5 this tribunal is how, how should the tribunal
6 resolve the inconsistency? The government argues
7 that this is essentially an administrative law
8 analysis, a Chevron analysis in which we should
9 defer to the Secretary of Defense as the head of
10 an agency and his interpretation of President's
11 military order should control in that sense.

12 But, sir, this is not an administrative law
13 matter; this is a criminal justice matter. We
14 are before a criminal tribunal. We are not
15 discussing a regulatory decision issued by the
16 EPA about how much nitrates we should let leach
17 into the soil. We are not discussing the type of
18 regulatory interpretation that you generally see
19 addressed in that administrative law analysis.
20 We are talking about a criminal proceeding, and
21 in a criminal proceeding we have the Common Law
22 standard to be applied when we are faced with
23 inconsistencies like that, and that is the rule

1 of lenity. When rules are inconsistent or
2 fatally in conflict, the appropriate action in a
3 criminal proceeding is to interpret them in the
4 light most favorable to the criminal defendant.
5 And this is a fundamental principle, this is a
6 fundamental principle to Western jurisprudence
7 because we embrace as a value the idea that we
8 have a burden to try a criminal accused and if we
9 can't get our own rules right or if we are not
10 clear about what the rules are, we always
11 revolve--resolve them in his favor. That's a
12 fundamental Western principle of law.

13

14 **Presiding Officer:** Let me ask you, and I am asking to back
15 up. You indicated that the government is wrong
16 in citing to statutory interpretation rules
17 dealing with, let's call it civil, non-criminal
18 matters. Is that--is that correct? Did I
19 understand your argument correctly?

20

21 **ADC:** That's--that's--that's a fair--yes, sir. That's
22 a fair----

23

1 **Presiding Officer:** It's not exactly what you've done in
2 your brief?

3

4 **ADC:** No, sir.

5

6 **Presiding Officer:** First--I'm looking at page----

7

8 **ADC:** I--I'm not suggesting they are wrong to cite
9 statutory construction principles. That's not
10 what they are doing. They are applying
11 administrative law principles of deference to the
12 head of an agency.

13

14 **Presiding Officer:** Statutory construction principles I
15 think is the way those cases all are
16 characterized.

17

18 **ADC:** Yes, sir, but in the administrative law context,
19 not in the criminal context.

20

21 **Presiding Officer:** Isn't that exactly what you're asking
22 me to do in your brief when you cite to Harper

1 Underwriters Insurance Company versus Union

2 Planners Bank?

3

4 **ADC:** Sir, that portion of the brief addresses basic
5 principles of statutory construction like "plain
6 meaning," which the government hasn't addressed
7 because the plain meaning resolves heavily in
8 favor of taking the language chosen by the
9 President and giving it the only plain meaning it
10 has----

11

12 **Presiding Officer:** All right.

13

14 **ADC:** ----which is that of a corporate body, a
15 Commission, and I think you referred to it
16 earlier today as the "entire Commission,"
17 implying that right now we only have a part of
18 the Commission. It is the Commission, the whole
19 thing, not a part. The PMO said, "triers of law
20 and fact," implying, again, that a plural group
21 of people--I mean, that's the meaning of the text
22 and that is the position----

23

1 **Presiding Officer:** Okay, I read that part of your brief.

2

3 **ADC:** Sir, there's another issue, of course, that's
4 raised here and that's whether or not once--once
5 we begin the proceeding under a set of rules,
6 however they are going to be interpreted, should
7 those rules change? Since the last time we
8 convened this Commission in January, several
9 MCIs--or, I'm sorry, at least one MCI has been
10 issued, the MCI on torture, several POMs have
11 been issued, several draft POMs have been
12 circulated, and the Appointing Authority
13 Regulation Number 2 has been rescinded and
14 replaced by a new one. And each of those steps,
15 has changed in some respect the procedures that
16 are in place and that govern how we conduct this
17 hearing, this trial.

18

19 **Presiding Officer:** Changed to further delineate or
20 redefine those procedures.

21

22 **ADC:** In some cases, it changed to further define them.
23 In other cases, it actually removes some

1 definition. And I'd like to direct your
2 attention to Appointing Authority Regulation
3 Number 2, which in its original incarnation----

4
5 **Presiding Officer:** What's that--I'm sorry, I missed
6 something. What's that got to do with the issue
7 of whether or not MCO 1 is in contradiction with
8 the Presidential military order?

9
10 **ADC:** Well, sir, Appointing Authority Order Number 2
11 flows from the MCIs, which in turn flow from the
12 MCOs. So I suppose it's not--it is an example of
13 why abatement is the right remedy. I think
14 that's what I'm getting at.

15
16 **Presiding Officer:** Well, I don't want an example. I want
17 you to stick to the--primarily the two points I
18 asked you address, the impact of the Detainee
19 Treatment Act and why this is jurisdictional and
20 not procedural.

21
22 **ADC:** Yes, sir. Sir, okay, I'm going to back up then
23 and address the jurisdiction issue at greater

1 length. The--there's another case that has been
2 cited on several of the comparable briefs on
3 this--this issue of abatement in other cases,
4 Runkle versus the United States. I've brought
5 that case here----

6

7 **Presiding Officer:** Is that something you want me to
8 consider----

9

10 **ADC:** Yes, sir.

11

12 **Presiding Officer:** ----for your brief?

13

14 **ADC:** Yes, sir. I'll bring it up. Well, it's
15 considered in response to the government's
16 assertion that this is a non-jurisdictional
17 motion.

18

19 **Presiding Officer:** All right. Do you have a----

20

21 **ADC:** Yes, sir.

22

23 **PROS:** Sir----

1

2 **Presiding Officer:** I'm sorry. Hold on a minute. Major

3

4

5 **PROS:** Sir, the defense has had an opportunity to reply
6 to our brief and they chose not to do so.

7

8 **Presiding Officer:** Well, I am not going to----I understand
9 that. I mean, if counsel want to cite the case
10 law, I am going to hear what they have to say.

11

12 **PROS:** Yes, sir.

13

14 **Presiding Officer:** Continue, Captain Merriam.

15

16 **ADC:** Thank you, sir.

17

18 Sir, this is a Supreme Court case from 1887, in
19 fact, and it--it is raised as a claim filed in
20 the court of claims by an officer who was
21 cashiered or dismissed from the service by court-
22 martial and he attacked the validity of the final
23 decision of that court-martial. But it speaks of

1 jurisdiction and that's why I want to--I want to
2 address it.

3

4 I'm referring now to the Lexis page number 556.
5 I am going to count, sir, the pages in the
6 actual--it would be in the 9th page, sir, on the
7 case I handed you, in the right-hand column.
8 It's the paragraph that begins, "A court-martial
9 organized under the laws of the United States."

10

11 **Presiding Officer:** All right. Do you have it there, Major

12

13

14 **PROS:** Yes, sir.

15

16 **Presiding Officer:** Go ahead.

17

18 **ADC:** Sir, it is admittedly a fairly lengthy paragraph,
19 but essentially what it tells us is that a court-
20 martial is a court of special limited
21 jurisdiction, much like a military Commission.
22 It is called into existence for a special purpose
23 and to perform a particular duty; again, much

1 like a military Commission. As you read further
2 down this paragraph, it makes it quite clear that
3 to give effect to its sentences, it must appear
4 affirmatively and unequivocally that the court
5 was legally constituted, that it had
6 jurisdiction, that all the statutory regulations
7 governing its proceedings have been complied
8 with, and that its sentence was conformable to
9 law. There are no presumptions in its favor so
10 far as these matters are concerned. It is the
11 lack of a presumption in its favor that tells us
12 that when we are dealing with the composition of
13 a court of limited jurisdiction, it must be
14 jurisdictional when that composition is called
15 into question because there are no presumptions
16 in its favor. There's an affirmative duty on the
17 government to show that it was in fact lawfully
18 constituted.

19 **Presiding Officer:** Properly constituted is one of
20 the several factors listed there,
21 separated by semi-colon, so I would
22 assume those are considered separate and

1 independent things by this--again, I
2 haven't had the opportunity to read it.
3 This is a 122 U.S. I 43 [122 U.S. 543; 7
4 S. Ct. 1141; 30 L. Ed. 1167; 1887 U.S.
5 LEXIS 2136], just for the benefit of the
6 record so we won't have to attach it.

7
8 **ADC:** Yes, sir. If you read the sentence that
9 concludes that page, it begins--it refers to a
10 decision by Chief Justice Marshall and it begins,
11 its language is, and as you turn the page, "The
12 decisions of district court require that
13 affirming of jurisdiction shall be positive, that
14 the declaration shall state expressly the fact on
15 which jurisdiction depends. It is not sufficient
16 that jurisdiction may be inferred
17 argumentatively--argumentatively from its
18 inference." So what we're saying here is that
19 we've called into question the composition of the
20 court, of the tribunal here, the Commission, and
21 the argument is essentially--and now it gets to
22 this point. If the law says you're going to be
23 tried by a three-judge panel and only one judge

1 shows up, then the court hasn't assembled and has
2 no jurisdiction to try you. And the defense
3 brief suggests that you are only one part of a
4 greater body, the Commission, and until the
5 Commission is assembled, there is no jurisdiction
6 over the accused. And that is how this motion is
7 jurisdictional and why the burden of persuasion
8 lies with the government.

9
10 If I could just conclude, sir, abatement is the
11 only remedy under the circumstances that would do
12 justice to this proceeding. It's fundamental to
13 a fair trial and the President's military order
14 directs us to conduct a full and fair trial, that
15 the rules be complete, that there be Logically
16 and textually consistent, and that they be fixed
17 before a trial can go forward. Sir, you should
18 halt the proceedings until--essentially until the
19 government can fix this inconsistency. Get it
20 right, get the rules together, then make sure
21 they are all going to fit together and work, and
22 then resume the proceeding. The accused is
23 entitled to know the rules and to know that they

1 will not change and that they are not subject to
2 interpretation from the bench when it comes to
3 something so fundamental as to whether or not the
4 court is properly composed. In the context of
5 the Commission, this is perhaps more important
6 than anywhere else. In other settings, let's say
7 a court-martial, we have rules. Certainly, we
8 have rules promulgated by the President, but they
9 are backed by substantive law, they are backed by
10 case law, they are backed by statutes. And so
11 when we have a gap, that gap can be filled
12 appropriately by a known quantum and known body
13 of law. If we look at Rule for Court-Martial
14 701, you know, addressing discovery and it--and
15 it puts requirement on the government to--to
16 intro--to get to the defense exculpatory
17 evidence. We know that whatever is not covered
18 by that rule, we can fall back on gap fillers
19 like Brady v. Maryland. They are going to tell
20 us what's missing.

21
22 **Presiding Officer:** Of course, until Brady v. Maryland was
23 decided----

1

2 **ADC:** We couldn't fall back----

3

4 **Presiding Officer:** we couldn't fall back on Brady v.

5 Maryland.

6

7 **ADC:** That's certainly true, sir.

8

9 **Presiding Officer:** The point is--point being that until

10 case law is decided, we don't have the case law

11 in any jurisdiction to fall back.

12

13 **ADC:** That's right, sir, and we don't have the case law

14 here, so gaps in the rules here are more

15 dangerous because neither the accused nor the

16 attorneys know what's filling them. None of us

17 know what's going to--what's going to control in-

18 -to proceed under those circumstances where the

19 rules are in flux as evidence by changed POMs,

20 new MCIs----

21

22 **Presiding Officer:** You're beyond the scope of your motion

23 right now, Captain Merriam.

1

2 **ADC:** Well, sir, it goes--it really goes to remedy. I
3 understand that we are addressing new facts that
4 have happened since the last session, much like
5 the Detainee Treatment Act, Appointing Authority
6 Regulation 2 was rescinded. So it goes to, I
7 think, to the remedy. And I'm wrapping up, sir.

8

9 But I think that really gets to why abatement is
10 the only appropriate remedy. What we're asking
11 is that you halt the proceeding, have the
12 government resolve these inconsistencies, fix the
13 rules in place, and then proceed when the parties
14 and particularly the accused have some confidence
15 and we all know what the rules mean and they are
16 not going to change. Until we can say that, the
17 defense submits we cannot go forward and conduct
18 the full and fair trial commanded by the
19 President. Thank you, sir.

20

21 **Presiding Officer:** Thank you, Captain Merriam.

22

23

Major [REDACTED]

1

2 **PROS:** Sir, we'll--we'll rest on our brief unless you
3 have questions.

4

5 **Presiding Officer:** No, that's fine. I'm not going to rule
6 because I do want to take the time to read your
7 case you handed me. Actually, I believe it was
8 two cases. I'll go ahead and take up the
9 discovery order at this time, at this point.

10

11 [The CDC rose.]

12

13 **Presiding Officer:** Why don't you have a seat for just a
14 minute, Mr. Ahmad.

15

16 **CDC:** Sure.

17

18 **Presiding Officer:** I assume you're going to be taking the
19 lead on it?

20

21 **CDC:** Yes, I am, Colonel.

22

1 **Presiding Officer:** All right. The defense motion
2 concerning the discovery order is marked as RE
3 77. The government's response is, I believe, is
4 83. And attached to the government's response is
5 the--I think it is pronounced the Lieber Code of
6 1863.

7
8 Mr. Ahmad, did you have anything else you wanted
9 me to consider or wanted to offer anything into
10 evidence?

11
12 **CDC:** I did, Colonel. I--my intent is just to be
13 responsive to issues raised by the government in
14 its brief rather than to--to reargue anything
15 that's in ours, so if I may.

16
17 **Presiding Officer:** I would appreciate that. Are you going
18 to cite to any more cases?

19
20 **CDC:** I am going to cite to two and I do have copies
21 here, so if I can give those to you. Now, I
22 provided one of these to the government.

23

1 **Presiding Officer:** What I would ask counsel to do--go
2 ahead and come on up here [retrieving documents
3 from the CDC]--it would be very helpful if, as
4 you're providing me with documents, that you
5 provide them to the clerk--assistant to the
6 presiding officer in electronic form, that way,
7 if it is necessary to attach them to the record
8 we can.

9
10 **PROS:** Sir, I--I have to renew my objection that I had
11 during the last motion. Again, this is new
12 authority provided by the defense at the very
13 last minute. We have a practice in place, we
14 file motions, we file responses, and then we file
15 replies to those motions if they want to address--
16 -if they want to add new authority or address
17 facts in that motion. The defense has not done
18 it in this case either and this should not be
19 considered as part of their argument. It's not--
20 prosecution should not be expected to respond to
21 several new cases, several new arguments by the
22 defense given to them moments before we're
23 scheduled to litigate the motions in this case.

1

2 **Presiding Officer:** Seems like a fair objection, Mr. Ahmad.

3 Obviously, you've done some research. You had
4 this law available to you. You could have put
5 both myself as well as the government on notice
6 long before we got there so that we would have at
7 least had the opportunity to read them and could
8 then understand, perhaps better, your argument,
9 better decide your argument. It would be also
10 consistent with the rules of court that are laid
11 out in the POM. Not to mention, I think, just as
12 a general practice, a courteous thing to do.

13

14 **CDC:** Well, sir, I don't disagree that, ideally, we all
15 would want to be able to provide things farther
16 in advance, but there is nothing that's ideal
17 about litigating here in Guantanamo; and that
18 goes for this motion, it goes for the one that--
19 the ones that my colleagues have argued. I
20 certainly would have wanted to provide this to
21 everyone in advance. I'll say that one of the
22 cases that I provided, the Burns case, I am led
23 to understand it is very well known among

1 military lawyers so I am certainly--if that's the
2 case, there's no need for me to provide it. The
3 other case that I provided in re Guantanamo
4 detainees is just the one that has come back
5 several times here and involves the same
6 litigants. I-I--I think it is difficult for the
7 government to say that they are surprised to have
8 before them where they can't respond to arguments
9 about a case that involves the United States
10 Government and Omar Khadr. It is the same
11 litigants; it deals with issues at Guantanamo
12 Bay. I certainly don't disagree that we--we need
13 to aspire to get things in to people in advance,
14 but, again, that, I think, has to be done within
15 the practical constraints of litigating at
16 Guantanamo.

17

18 **Presiding Officer:** Well, of course----

19

20 **CDC:** And we're all struck like that.

21

22 **Presiding Officer:** Of course, if we want to--I'm trying to
23 think off hand how many volumes of MJs are--

1 military justice reports, and how many cases are
2 contained in those. Now [picking up Manual for
3 Courts-Martial] this is the Manual for Courts-
4 Martial. I dare say I would not ask anyone to
5 practice in a court-martial without having access
6 to this so that they could reference it. To say
7 that a government attorney should be familiar
8 with all military cases and therefore it doesn't
9 require any kind of heads-up to opposing counsel,
10 more importantly, to me because you're asking me
11 to decide the issue and I would presume you want
12 me to decide the issue correctly because you
13 decided your position is the correct position, to
14 give me the opportunity to read the case so that
15 I can look at the specifics of it and see how it
16 applies or doesn't apply to this. If I choose to
17 do so, pull it up on Lexis and sheppardize it to
18 see if it is still current, if there's other
19 cases that might have interpreted it and give me
20 a better understanding of how to apply it. I--I
21 dare say--how many ca--how many cases have I been
22 handed, seven? I don't know. That all of those
23 weren't pop-ups since you've arrived here on

1 Guantanamo Bay. Even if they were, most everyone
2 has email. I am not hard to find, and it would
3 have been possible to at least give me the
4 courtesy of handing this to me, perhaps this
5 morning when we started these proceeding or
6 yesterday when we greeted each other walking up
7 the thing, "Hey, Colonel, I've got some
8 additional authority that I would like to be able
9 to argue tomorrow in our session." That seems to
10 me as a common courtesy and your argument that it
11 is difficult because we're here in Guantanamo Bay
12 only goes so far. Even the ability to read it
13 the day before we came to court would have been
14 helpful and I think within the abilities of the
15 defense. That's me. Whether you want to call
16 that legal precedence or legal authority or
17 anything else is a matter of common courtesy, I
18 think.

19

20 **CDC:** Well, Colonel, I don't disagree with you, and--
21 and----

22

23 **Presiding Officer:** Well, then why don't you do it?

1

2 **CDC:** Well, if I could explain.

3

4 **Presiding Officer:** Go ahead.

5

6 **CDC:** I don't disagree that things should be given
7 certainly to you and, of course, the government
8 in advance and certainly as far in advance as we
9 can manage, but, sir, I think that the idea that
10 when we walk through these doors suddenly
11 everything functions like we are in a court is at
12 odds with the rest of reality when working on
13 these cases. We talked before----

14

15 **Presiding Officer:** Mr. Ahmad, I'm talking about common
16 courtesy that you're asking me to consider a
17 legal precedent in deciding an issue that you
18 want me to decide and handing it to me in the
19 middle of your argument on that issue. Courtesy
20 dictates that you give me at least the
21 opportunity to read it before I walk in here. I
22 mean, if we want to push the envelope, we can
23 return here on the 24th of April after I've had

1 an opportunity to read all these, after the
2 prosecution has had the opportunity to read them
3 and respond and provide similar, perhaps,
4 authority that contradicts your authority. You
5 know, if that's what would be helpful, we could
6 do that. I am not sure anybody wants to do that.
7 I think the better practice is to provide the
8 legal authority in advance. I'm--I'm not sure
9 why walking through the doors of this courtroom
10 is any different than walking through the doors
11 of any courtroom where you want the presiding
12 officer, be he a judge, be he an administrative
13 law judge or anything else, you want him to
14 decide your issue and then you hand him in the
15 middle of the argument 30 or 40 or 50 pages of
16 case law that you want him to then somehow read,
17 digest, research, and then be able to respond or
18 even ask you questions concerning the impact of
19 these cases on the decision he's supposed to
20 decide.

21
22 Take a 10-minute recess.
23

1 *The Commissions Hearing recessed at 1850, 5 April 2006.*

2

3 *The Commissions Hearing was called to order at 1923,*

4 *5 April 2006.*

5

6 **Presiding Officer:** The Commission will come to order. All

7 of those present when we recessed are again

8 present.

9

10 Mr. Ahmad, I am going to consider the cases of

11 the citations, the cases that you provided to me.

12 However, I find that there is no excuse or

13 justification for providing them to either myself

14 or the government at this late hour. As a

15 consequence, I am going to give the prosecution

16 the option to, by close-of-business of the

17 following week, that is, Friday, to provide to

18 the Commission any legal authority and a reply

19 brief that they choose to should they choose to

20 do so.

21

1 You will serve that on both myself and the
2 defense, Major [REDACTED] should you elect to do
3 that.

4
5 Any questions on that?

6
7 **PROS:** No, sir.

8
9 **CDC:** No, Colonel.

10
11 **Presiding Officer:** Okay. Mr. Ahmad, your argument.

12
13 **CDC:** Well, Colonel, as I said, I am going to just
14 focus on arguments that are responsive to
15 government's brief. Our starting point is what I
16 think is an obvious one, which is that in order
17 for this proceeding to be fair, there has to be a
18 process for discovery that permits our client to
19 know the evidence against him. The issue we
20 raise in our motion is that to the extent that
21 any discovery rules exist in this case, that they
22 would satisfy minimum standards of fairness. The
23 Commission rules provide, in our view, little as

1 far as rules regarding discovery. POM 7-1
2 attempts to compensate for this by authorizing
3 presiding officers to issue discovery orders in
4 the individual cases. We believe that this
5 approach to discovery runs afoul of due process
6 in two regards. And I will mention briefly what
7 each of these is, but I turn my attention first
8 to, in light to the government's brief, is the
9 threshold argument and that is whether the due
10 process clause even applies here.

11
12 So there are two due process problems that are
13 presented here. The first is that the rules, as
14 they are written, are inadequate because they
15 lack sufficient standards and they are subject to
16 constant change, as we talked about earlier
17 today. To put it in another way, there aren't
18 sufficient benchmarks. In order for the rules to
19 be meaningful, the parties must know in advance
20 what they are, know that they won't change, and
21 know that they enable sufficient opportunity for
22 the defendant or the accused to defend himself.
23 The government argues that the standard is full

1 and fair, and as I will argue later, I think the
2 full and fair doesn't have an inherent meaning.
3 Think of the 8-5 we just had. You suggested that
4 full and fair doesn't have inherent meaning. The
5 discovery rules have to be subject to some
6 external measure or yardstick of fairness, and we
7 suggest that that yard, external measure----

8

9 **Presiding Officer:** I--I--I----

10

11 **CDC:** ----is due process.

12

13 **Presiding Officer:** First of all, it was not my intent to
14 summarize what we talked about in the 8-5. We
15 can get into that now if you'd like to. I kind
16 of had the impression you didn't want to do that
17 at this point. But, secondly, that was not--I
18 don't think your characterization of what I said
19 was accurate.

20

21 **CDC:** Okay.

22

1 **Presiding Officer:** What I said was--was I am tasked to
2 provide a full and fair trial and the extent of
3 my authority is--the left and right lateral limit
4 are unknown, the same as a trial judge that is
5 tasked with providing a full and fair trial and
6 has authority that spans left and right and those
7 limits are not clearly defined.

8

9 **CDC:** Well, I--obviously, Colonel----

10

11 **Presiding Officer:** If you took it in any other context,
12 then--then you misinterpreted what I said.

13

14 **CDC:** Okay. I appreciate the clarify--clarification.
15 I certainly didn't intend to mischaracterize your
16 statement. I think the larger point, though, if
17 we are going to make a comparison here, is that
18 in any other context there are clear standards
19 and, in particular, if we were to look at either
20 the court-martial system or criminal courts,
21 there's due process as a standard. An external
22 measure of fairness, an external measure of what

1 constitutes a full and fair process. I'd like to
2 come back to that, if I may.

3

4 The second problem that I think is presented, due
5 process problem that's presented by discovery
6 rules as they are currently written and
7 constituted is that--is the fact that different
8 presiding officers can issue different discovery
9 rules under POM 7-1.

10

11 **Presiding Officer:** Different discover orders?

12

13 **CDC:** Different discovery orders, which, frankly, I
14 think is tantamount to different discovery rules.
15 Because the presiding officers can issue
16 different discovery orders and therefore
17 different discovery rules, this means that there
18 is a potential that the fairness of a Commission
19 ' proceeding may vary depending solely on which
20 presiding officer is assigned to which case.
21 This, I think, is inherently arbitrary and
22 therefore violates due process as well.

23

1 Turning then to the, if I can, to the
2 government's argument regarding----

3

4 **Presiding Officer:** Can you hold up just for a moment,
5 please.

6

7 **CDC:** Sure.

8

9 [The presiding officer instructed the bailiff to retrieve
10 his eyeglasses, and the bailiff did as directed.]

11

12 **Presiding Officer:** Please--please continue, Mr. Ahmad, and
13 I apologize for the interruption.

14

15 **CDC:** No worries. The government has raised this
16 threshold argument that our motion must fail
17 because due process does not apply in these
18 proceedings. And, Colonel, I think this is an
19 astonishing argument to make, that the due
20 process clause does not extend to Mr. Khadr, does
21 not extend to a detainee here at Guantanamo.

22

1 According to the government, the due process
2 clause does not protect citizens who have--and
3 here I'm quoting from the government's opposition
4 brief in page 5--"Who have no lawful connection
5 to the United States." Colonel, the government
6 is wrong on this issue, they are wrong on the
7 merits, and in any event this issue has already
8 been decided it's been decided--the issue has
9 been litigated by the very parties who are here
10 before you today and exactly this issue has been
11 decided by a federal district court in the case
12 of in re Guantanamo detainees, which I provided
13 both you and the government copy of.

14
15 As I suggested earlier, the litigants in In re
16 Guantanamo Detainee cases are exactly the
17 litigants here; Mr. Khadr on the one hand, the
18 United States on the other. The issue that was
19 presented squarely to the court there and which
20 the court decided was does the Fifth Amendment
21 due process clause apply to Mr. Khadr and other
22 detainees here at Guantanamo Bay? Here is what
23 the court concluded; I'm reading from 355 F Supp

1 455. "In light of the Supreme Court decision in
2 Rasul, it is clear that Guantanamo Bay must be
3 considered the equivalent of a U.S. territory, in
4 which fundamental constitutional rights apply.
5 Accordingly and under the precedents set forth in
6 Verdugo-Urquidez, Ralpho, and the earlier Insular
7 Cases, the respondent's contention that the
8 Guantanamo detainees have no constitutional
9 rights is rejected, and the court recognizes that
10 detainees rights under the due process clause of
11 the Fifth Amendment." So in this case, Colonel,
12 a federal court considered exactly the argument
13 made by the government here in a case involving
14 exactly the same litigants, Mr. Khadr and the
15 United States Government, and issued a final
16 decision on the matter. Prior litigation of the
17 same issue by the same parties, those are the
18 ingredients of collateral estoppel, and if these
19 principles of jurisprudence apply here in the
20 Commission, then under the doctrine of collateral
21 estoppel, the government is precluded from
22 arguing the issue here. The issue has been
23 decided. Mr. Khadr clearly has due process

1 rights. In order for you to find otherwise, you
2 would have to disregard the considered opinion of
3 a senior judge on the U.S. District Court for the
4 District of Columbia.

5
6 Now, I note that this case decided by Judge Green
7 is currently pending before the DC Circuit.

8 There was oral argument on it the second time
9 just last week; but, pending that appeal, Judge
10 Green's decision remains the law of the case,
11 which is to say that it is the decision that is
12 in effect and therefore the decision retains its
13 preclusive effects here. And so, due process I
14 think applies.

15
16 I want to deal very briefly with, what I
17 understand to be, one of the central parts of the
18 government's argument as to why due process
19 doesn't apply. There are three cases that in
20 particular that seem the government is relying
21 upon to argue that due process does not apply to
22 the Commission and does not apply to Mr. Khadr,
23 the Quirin case, Yamashita, and Eisentrager.

1 With regard to Eisentrager, the Supreme Court
2 explicitly overruled at least a portion of
3 Eisentrager in the Rasul decision in 2004. That
4 threw the rest of Eisentrager into question and
5 the *In re Guantanamo detainee* case that I cited
6 previously deals explicitly with the Eisentrager
7 argument. And what Judge Green concludes is that
8 what the Supreme Court said in Rasul that
9 Eisentrager does not prohibit, in fact, does not
10 preclude the jurisdiction of the federal courts
11 in the habeas corpus, over claims by detainees
12 at--here--at Guantanamo. Challenged the legality
13 of their detention. That--what that must also
14 mean is that those detainees have substantive
15 rights, and those rights include due process
16 rights under the Fifth Amendment. I want to note
17 parenthetically, Colonel, that the government
18 does not mention in *In re Guantanamo Detainees* in
19 their brief, even though, as I've said before, it
20 involves the same parties litigating the same
21 issue.

1 Going to the other two cases that the government
2 relies upon, Quirin and Yamashita, these are both
3 cases from the 1940s. Let me start with Quirin.
4 In the government's brief, they suggest that
5 Quirin stands for the proposition that Fifth
6 Amendment rights do not--and let me clarify--that
7 the due process rights of the Fifth Amendment do
8 not apply to the Commissions and, in particular,
9 do not apply to Mr. Khadr. That's not what
10 Quirin says. In Quirin, the Fifth Amendment
11 issue that was presented was whether in a
12 military Commission there was a Fifth Amendment
13 right to an indictment by a grand jury. There
14 was no indictment by a grand jury there. In
15 Quirin, what the court says is because this was a
16 case arising under the Fifth Amendment exception
17 for cases arising on the land or naval forces,
18 there was no requirement by the plain meaning of
19 the Fifth Amendment for an indictment by grand
20 jury. That is the only Fifth Amendment issue
21 that Quirin deals with. Here are one--quote from
22 the Quirin decision, this is at 317 U.S. 1, as a
23 start of the decision, and I am reading at page

1 45. I believe this is language that the
2 government quotes, but I think they quote it for
3 the wrong reason. I am quoting, "We conclude
4 that the Fifth and Sixth Amendments did not
5 restrict whatever authority was conferred by the
6 Constitution to try offenses against the law of
7 war by military Commission in that petitioners
8 charged with such an offense not required to be
9 tried by a jury at Common Law were lawfully
10 placed on trial by the Commission without jury."
11 Let me just clarify the Fifth Amendment issue
12 here was--that I'm focusing on was indictment by
13 grand jury. There was also a Sixth Amendment
14 issue about a right to a jury trial. That's not
15 part of what I'm litigating in our motion; that's
16 why I'm focusing on the Fifth Amendment issue.

17
18 The language here that the Fifth and Sixth
19 Amendments do not restrict whatever authority was
20 conferred by the Constitution, suggesting there
21 may well have been authority conferred by the
22 Constitution on military Commissions, and merely
23 that the Fifth Amendment didn't invalidate that.

1 Quirin does not stand for the proposition that
2 the Fifth Amendment doesn't apply; it certainly
3 can't stand for the proposition that the due
4 process clause doesn't apply because due process
5 was never addressed. This was a case that dealt
6 with an exception to indictments, that is part of
7 the text of the Fifth Amendment itself. Let me
8 also suggest that Quirin needs to be read within
9 the jurisprudence of the day. This case was
10 decided in 1942. At that time, habeas review of
11 a military case, whether a military Commission or
12 a court-martial, habeas review on the federal
13 courts was limited to jurisdictional issues,
14 which is to say in habeas proceedings in federal
15 court, the power of the court to review a
16 decision by a military--by a court-martial, was
17 limited solely to the issue of whether the issues
18 litigated in the court-martial fell within the
19 jurisdiction of the court-martial. That's no
20 longer the law.

21
22 Now I refer to the other case I distributed,
23 which is Burns versus Wilson, decided in 1953.

1 Burns ushered in essentially a new era in review
2 of military court-martial cases. It expanded
3 beyond review, limited solely to jurisdictional
4 issues. And it provides that courts can review
5 for procedural fairness, that is to say, due
6 process. So Quirin has to be read in the context
7 in which it arose, which was a pre-Burns case.

8
9 Now, I turn next to the government's argument
10 with regard to Yamashita. It is 327 U.S. 1,
11 decided in 1946. First, again, is the
12 jurisdictional argument. This is a pre-Burns
13 versus Wilson case. The only thing that was--the
14 only review that was available at the time was
15 that of--the jurisdiction of the military
16 proceeding. There was none available, under the
17 jurisprudence of the day, review of procedural
18 fairness or due process.

19
20 There are two other arguments I want to make with
21 regard to Yamashita because I think, again, it
22 does not support the government's position. If
23 anything, it supports ours. The government

quotes from Yamashita in its brief, and here--I'm looking at page 5 of the government's brief, in the block quote. Again, the government is--I'm sorry, page 6, the quote that is in bold at the end of the first full paragraph. Again, the government is attempting to use Yamashita to argue that due process is not available in the Commissions, and the language they quote is, "The Commissions' rulings on evidence and on the mode of conducting these proceedings are not reviewable by the courts." Now, there are a couple of things that I think need to be said about that.

First of all, non-reviewability by the courts, which, again, was consistent with the pre-Burns jurisprudence, doesn't tell us anything about constitutional rights. Secondly, we now have, with regard to the--let me say this. To the extent that non-reviewability does tell us anything about existence of constitutional rights, which is to say if the mode of conducting proceedings was non-reviewable by the courts and

1 therefore, according to the government, that
2 means that the individual in Yamashita didn't
3 have constitutional rights. Well, now, with
4 regard to these proceedings in 2006, there is
5 review available of these proceedings under the
6 Detainee Treatment Act. The Detainee Treatment
7 Act explicitly provides for review of the
8 fairness of these proceedings in the DC Circuit
9 Court of Appeals. So that, too, distinguishes
10 Yamashita.

11
12 The last point I will say with regard to this is
13 that not only does the Detainee Treatment Act
14 provide for review of the fairness of these
15 procedures, something that wasn't available at
16 the time of Yamashita, but the language of the
17 Detainee Treatment Act is that their review can
18 be done with regard to the--to the constitutional
19 issues to the extent that the Constitution and
20 law of the United States applies. That to me
21 seems quite clear evidence that Congress has not
22 considered it a settled issue that the
23 Constitution does not apply at Guantanamo and,

1 more specifically, that the Constitution does not
2 apply to military Commission proceedings. If
3 that is what Congress thought, if Congress
4 believed that the Constitution and due process
5 had no application, then there would be no need
6 to write into the statute that would suggest at
7 the end of 2005, language saying that to the
8 extent that the Constitution and the laws of the
9 United States apply, that those types of
10 challenges, constitutional and other legal
11 challenges of the military Commissions that we
12 are currently in, can be brought to the DC
13 Circuit.

14
15 If I can just quote one last part from Yamashita,
16 this is on page 23 of the decision 327 U.S. 23,
17 quoting, "For reasons already stated, we hold
18 that the Commissions' rulings on evidence and on
19 the mode of conducting these proceedings against
20 a petitioner are not reviewable by the courts,
21 but only by the reviewing military authorities."
22 That's a fuller version of what the government
23 quoted. Here is the next line that the

1 government did not quote, "From this viewpoint,
2 it is unnecessary to consider what in other
3 situations the Fifth Amendment might require and
4 as to that no intimation one way or the other is
5 to be implied." The court is stating in no
6 uncertain terms that they are not making a ruling
7 here about the application of the Fifth Amendment
8 in any context outside of Yamashita. No
9 intimation, one way or another, is to be implied.
10 That's the language of the court. It seems to me
11 the government cannot rely on Yamashita for the
12 point for which they cite it.

13
14 Colonel, just briefly, let me then just go back
15 to--if you are to accept that the due process
16 clause does apply here, what then do we do?
17 What's the problem and how do we fix it? Well,
18 as I suggested earlier, there are two problems
19 that we see with regard to the discovery rules as
20 they are currently written. One is the lack--
21 they are insufficient--they lack benchmarks, and
22 they are subject to change. That in and of
23 itself is violative of due process because it

1 doesn't permit the defense, it doesn't provide
2 the defense with predictable rules on which you
3 can rely in order to get what's necessary to put
4 on a meaningful defense for Mr. Khadr. As I
5 suggested earlier, the second argument is that
6 because different presiding officers are going to
7 come up with different discovery orders, we can
8 imagine, in fact, we should expect that if we
9 have a range of discovery orders some of them are
10 going to be more favorable to--to the accused--
11 individual accused than others are. And what
12 that means is that by virtue of nothing more than
13 what--what I assume is a random assignment of
14 cases to presiding officers, there is going to be
15 a different set of discovery rules. In fact,
16 maybe a set of discovery rules that are more
17 favorable for one person and less favorable to
18 another. That in and of itself creates a kind of
19 arbitrariness in the system that I think that we
20 all would want to do away with.

21
22 You mentioned earlier, Colonel, before our last
23 recess, holding up the Manual for Courts-Martial

1 [holding up the Manual for Courts-Martial], a
2 copy of which I have here. That you wouldn't
3 recommend that anyone go in to military
4 proceeding without this. I agree. Our argument
5 is you've got--and by "you" I mean the
6 Commissions--have a real due process problem here
7 that we need to figure out how to solve. The
8 military, the Manual for Courts-Martial, the
9 rules for discovery provided in the Manual for
10 Courts-Martial, is a constitutionally sufficient
11 way of satisfying that problem. It is not to say
12 that the Constitution requires that these rules
13 be applied, but if the rules are applied, I think
14 that the constitutional issue is addressed.
15 That's all that we're asking for, we're asking
16 for a very modest legal finding, which is, again,
17 *res judicata* on the one hand while law of the
18 case on the other; and on the merits, in any
19 event, the conclusion is that due process applies
20 here. And looking at the discovery rules, their
21 paucity, the gaps between them, the fact that
22 they can change, the fact that different accused
23 before different presiding officers can get

1 different results, that requires that there be
2 some change made and this is the remedy that we
3 propose.

4
5 Thank you.

6
7 **Presiding Officer:** Thank you, Mr. Ahmad.

8
9 Major [REDACTED]

10
11 **PROS:** Thank you, sir. Before I argue, I'd like to
12 first admit Prosecution Exhibits--I'm sorry,
13 Review Exhibits 97, 98, and 99 into evidence.

14
15 **Presiding Officer:** What's the purpose of that?

16
17 **PROS:** Sir, these exhibits--initially, they have been
18 provided to the defense. I'll take them one by
19 one.

20
21 Pros--Review Exhibit 97 is a translation of the
22 audio on Review Exhibit 99. Review Exhibit 99 is
23 a CD----

1

2 **Presiding Officer:** I'm sorry, I don't have 99. What is
3 99?

4

5 **PROS:** It is actually a CD, sir. This is a paper copy
6 of a CD.

7

8 **Presiding Officer:** Is the CD a data disk, is it a video?

9

10 **PROS:** It is a video, sir. It is a video of the accused
11 making----

12

13 **CDC:** Excuse me, Colonel. Before--before the--before
14 you describe what the video is or isn't showing,
15 I'd like to ask for a proffer as to what the
16 relevance of this is to discovery issues.

17

18 **Presiding Officer:** Well, that's what I'm trying to get to,
19 Mr. Ahmad.

20

21 **CDC:** Well, I understand, but I believe that major was
22 about to----

23

1 **Presiding Officer:** I need to know what they are before I
2 can ask for a profer.

3

4 **CDC:** Well, I believe the major was about to describe
5 something that's not been admitted into evidence
6 and I think that there's a danger that's
7 prejudicial and I think we ought to take efforts
8 to pro--to prohibit that from happening.

9

10 **Presiding Officer:** Prejudicing who?

11

12 **CDC:** Prejudicing my client.

13

14 **Presiding Officer:** In what way?

15

16 **CDC:** The fact this coming as a review exhibit is not
17 known to anyone except for the government and
18 defense lawyers, and he's about to announce,
19 "Here's what we've got."

20

21 **Presiding Officer:** Well, I am not asking him to tell me
22 what's on--your objection is overruled. I am
23 trying to figure out what we're doing here.

1

2

What is it you're trying to do, Major [REDACTED]

3

4

PROS: Sir, I'm asking that this exhibit only be

5

admitted for the purpose of this motion.

6

7

Presiding Officer: And for what? Well, first of all,

8

we're into argument, so we are past offering

9

evidence. I--I----

10

11

PROS: Sir, I----

12

13

Presiding Officer: Go ahead.

14

15

PROS: I apologize, sir. You didn't ask if we had

16

evidence to offer at the beginning. I assumed

17

you were going to wait until after the defense

18

had argued the motion. This is certainly the--

19

the defense is----

20

21

Presiding Officer: But what's the purpose of this

22

evidence? And I've read the--you know, quite

23

frankly, I've read 97, it's like three pages;

1 I've read 98; and 100, I guess 100 as well, the
2 proposed trial schedule. I haven't seen and I
3 don't know exactly what 99 is.

4
5 **PROS:** As I was about to say, sir, 99 is a videotape
6 taken in Afghanistan and showing the accused----

7
8' **Presiding Officer:** Okay. What is the purpose of offering
9 those on this motion?

10
11 **PROS:** Well----

12
13 **Presiding Officer:** I've read the transcript; I've read
14 the--I've read 98, which is a--seems to be an
15 accounting of someone's actions and it seems to
16 involve the accused over in Afghanistan.

17
18 **PROS:** Yes, sir. In our brief, we allege certain facts
19 and, as customary in our practice, we prove up
20 those facts whether filing--when filing motions.

21
22 **Presiding Officer:** What's the relevance of those facts?
23 Because I, quite frankly, I think you're quoting

1 somebody, something about lawless wretches, which
2 I quite frankly don't consider a fact at all.

3

4 **PROS:** Sir----

5

6 **Presiding Officer:** I mean, what are alleged here in the
7 beginning of this--this motion as facts what
8 appear to be the conduct of the accused, and it
9 also goes into some of the things that led up to
10 September 11th and nobody should connect those
11 two thoughts, but, I mean,
12 there's--there's a number of those things that
13 are alleged here about the accused's actions, at
14 least of the al-Qaeda. What is the significance
15 of that for purposes of this motion?

16

17 **PROS:** The significance, sir, is that the video
18 demonstrates the accused committing a law of war
19 violation in Afghanistan. The underlying facts
20 of this motion are that the accused committed law
21 of war violations and the proper place to handle
22 that is a military Commission, and in the
23 military Commission, the Rules for Court-Martial

1 do not apply. In addition, sir, I note that the
2 defense brief was almost entirely devoted to
3 discussing the due process clause of the Fifth
4 Amendment. If you take the Fifth Amendment
5 cases, particularly Quirin, which establishes
6 that an enemy combatant has no constitutional
7 rights. This video establishes that the accused
8 is in fact an enemy combatant. If you take the
9 Verdugo case, it establishes that the
10 Constitution does not apply outside of our
11 boundaries to non-citizens. This video
12 establishes the accused committed his violations
13 of law of war in Afghanistan. This--this video
14 presents prima fascia evidence of the accused's
15 law of war violations and establishes the basis
16 to handle that by military Commission.

17

18 **Presiding Officer:** All right. Thank you.

19

20 Mr. Ahmad?

21

22 **CDC:** Colonel, my--am I--are you asking me to respond
23 to what Major [REDACTED] has said thus far or----

1

2 **Presiding Officer:** Yes, as to whether or not I should
3 consider the exhibits, to include the video, for
4 purposes of the motion.

5

6 **CDC:** I can't, for the life of me, see how it's
7 relevant to a legal question, which is what's
8 presented here. I mean, there's been a statement
9 of charges put in that's making allegations that
10 Mr. Khadr is an enemy combatant. There's--the
11 statement of charges makes various other
12 allegations of what the government believes that
13 he did. I think that, for the purposes of
14 deciding this discovery motion, you can take into
15 account what the government seeks to prove, but I
16 can't see any reason why you would have to look
17 at evidence on what they say Mr. Khadr did do or
18 didn't do in order to decide a legal question.
19 Does the due process clause apply? That doesn't
20 turn on what they said--on what they say he did.
21 We all know we're in a military Commission;
22 there's no reason to argue that we're in a

1 military Commission. We know that, that's self-
2 evident. Our motion hasn't contested----

3

4 **Presiding Officer:** All right----

5

6 **CDC:** ----his determination as being an enemy
7 combatant.

8

9 **Presiding Officer:** Enough. Thank you.

10

11 Major [REDACTED] to the extent that I did not
12 offer you that opportunity before I entertained
13 argument, I apologize if I did not. But,
14 frankly, I thought you intended to offer that
15 stuff on the abatement motion and then elected
16 not to. I--I see no purpose to consider that for
17 purposes of this motion. I think it is in fact a
18 legal question and does not require that
19 evidence, so I will not consider it. I am not
20 sure what we do now that it is marked as a review
21 exhibit. I think the review exhibit--it
22 continues to be a review exhibit. As I said,
23 I've looked at 90--97 and 98. I have not seen

1 the videotape nor do I intend to view the
2 videotape at this time----

3

4 **PROS:** All right, sir.

5

6 **Presiding Officer:** ----and I will not consider any of that
7 for the purposes of this motion.

8

9 **PROS:** All right, sir.

10

11 **Presiding Officer:** Your argument?

12

13 **PROS:** Thank you, sir. Sir, I--I'd initially like to
14 point out that the reason why we didn't cite in
15 re Guantanamo case in our brief is because it is
16 contrary to 200 years of Supreme Court precedent.
17 It is a lower court decision that would overturn
18 every other case that the Supreme Court has ever
19 issued dealing with the status of enemy
20 combatants. I also would like to point out, and
21 I apologize, I was just handed this case right
22 before we started, but I would like to point your

1 attention to another U.S. district court case,
2 Khalid versus Bush.

3

4 **Presiding Officer:** Do I have that case?

5

6 **PROS:** I don't believe you do, sir. I--again, this is a
7 case I got immediately before we started the
8 session. My response to that case, which I was
9 not prepared to argue, I quote this case, which
10 is from the same circuit.

11

12 **Presiding Officer:** This is a case that you pulled during
13 some research after you were handed the cases by
14 the defense? Have you----

15

16 **PROS:** Yes, sir.

17

18 **Presiding Officer:** I've already got the----

19

20 **PROS:** That's accurate, sir.

21

22 **Presiding Officer:** And what's the name of it?

23

1 **PROS:** It is--and I apologize, I don't know how to
2 pronounce the first name.
3
4 **Presiding Officer:** Well, give me the citation.
5
6 **PROS:** 355 Fsupp.2d 311.
7
8 **Presiding Officer:** All right. Do you have a copy of it
9 for me and for the defense?
10
11 **PROS:** Yes, sir [handing documents to the defense
12 counsel and the presiding officer].
13
14 **Presiding Officer:** And where do you want?
15
16 **PROS:** Sir, I point your attention to page 18.
17
18 **Presiding Officer:** All right.
19
20 **PROS:** And specifically, this case stands for the
21 proposition that non-resident aliens captured and
22 detained outside of the United States have no
23 recognizable constitutional rights. These two

1 cases are currently pending before the DC
2 Circuit, and we have every reason to believe that
3 they will follow the decision in Khalid v. Bush,
4 as well as over 200 years of Supreme Court
5 precedent.

6
7 Sir, the accused is alleged to be a trained al-
8 Qaeda operative, captured in Afghanistan,
9 committing violations of the law of war against
10 U.S. forces. He does not have constitutional
11 rights. He's being tried in a military
12 Commission, and the Rules for Courts-Martial do
13 not apply, nor does the Fifth Amendment due
14 process clause. He is due a certain process, and
15 in fact, he is receiving more process than any
16 enemy combatant in the history of warfare. But
17 he is not entitled to Fifth Amendment due process
18 under the Constitution. The President has
19 determined that the accused's trial belongs
20 before a military Commission and not a court-
21 martial. As I stated earlier, sir, the defense
22 motion relies largely on the due process clause
23 of the Constitution. And, again, our position

1 and 200 years of Supreme Court case law
2 establishes it does not apply to the accused.
3 Alien enemy combatants have no recourse under the
4 Constitution, including the due process clause.
5 The defense motion failed to cite any authority
6 that stands for the proposition that an alien
7 enemy combatant has any right under the U.S.
8 Constitution. To the contrary and as I stated
9 before, there is significant authority holding
10 that the Constitution guarantees under the Bill
11 of Rights, and that the Bill of Rights in the
12 Constitution are not applicable to military
13 Commissions. Sir, the President's constitutional
14 war powers, the congressional authorization for
15 use of force, Articles 21 and 36 of the Uniform
16 Code of Military Justice, authorize the President
17 to prescribe the rules for military Commissions,
18 and the President has determined that the
19 discovery rules and procedures which govern
20 trials by court-martial do not apply. The
21 President's military order directs that the
22 accused will receive a full and fair trial. The
23 President further directed the Secretary of

1 Defense to establish procedures consistent with
2 this order; and the Secretary has done so
3 regarding this order, specifically, Military
4 Commission Order Number 1, which requires the
5 prosecution to provide the defense with access to
6 all evidence we intend to introduce against him
7 in this proceeding. It also requires us to
8 provide the defense with all evidence that tends
9 to exculpate the accused. Application of this
10 standard will ensure that the accused will
11 receive a full and fair trial as required under
12 the President's military order.

13
14 Finally, sir, the accused is charged with
15 terrorist acts that, if proven, are violations of
16 the law--the common law of war and should be
17 tried by military Commissions. In determining
18 that the rules of procedure and the evidence used
19 in a criminal trial are inapplicable to these
20 Commissions, the President relied on both
21 constitutional and congressional authority backed
22 by centuries of historical precedent. That
23 determination has a sound basis in law, which

1 should not be disturbed by this Commission,
2 therefore, the presiding officer should deny this
3 motion.

4

5 **Presiding Officer:** Thank you, Major [REDACTED]

6

7 Mr. Ahmad, do you want to respond? And, if so, I
8 will give you 5 minutes.

9

10 **CDC:** Very briefly. The prosecution says they didn't
11 cite in re Guantanamo detainees because it goes
12 contrary to 200 years of Supreme Court precedent.
13 That may or may not be true; it doesn't matter,
14 it is the law of the case. It involves these
15 parties on this issue. They are estopped from
16 making a contrary argument. Just because they
17 don't like the outcome of it, doesn't give them
18 leave not to cite the case. Now, I don't believe
19 there is a POM on this, but if we were in some
20 other court, failure to cite a case involving the
21 same parties on the same issue, that is
22 controlling and would present a problem of its
23 own. The government looks instead at the

1 companion case decided 10 days or so earlier, the
2 Khalid case, by another judge on the federal
3 district court. And the prosecution is right,
4 that judge reached a different conclusion. It
5 doesn't matter. It didn't involve Mr. Khadr
6 engaged in litigation with the government. It
7 involved other detainees; it's not the law of
8 this case. Now, sure, do we wonder what the DC
9 Circuit is going to do? Absolutely. It might be
10 overturned? Judge Green's decision. I suppose
11 they could. Have they? No. The law of the
12 case, what's controlling here, is the decision by
13 Judge Green. It's still--I think the explanation
14 for why it wasn't cited, I think, is
15 insufficient. The prosecution says Verdugo
16 stands for the proposition that the Constitution
17 doesn't apply outside of the United States.
18 That's not true. Verdugo dealt with the very
19 narrow issue of the application of the Fourth
20 Amendment to someone who was captured and
21 rendered forcibly from Mexico to the United
22 States. It was a Fourth Amendment case, not a
23 Fifth Amendment case. If you look at Verdugo,

1 which I didn't provide because the government
2 cited to it, if you look at Verdugo, the court
3 draws a distinction between a Fourth Amendment
4 analysis of extraterritoriality and a Fifth
5 Amendment analysis, and what it concludes is that
6 the Fourth Amendment is narrower. Verdugo does
7 not stand for what the government suggests that
8 it does.

9
10 The last point I want to make, sir, is the
11 government says that Mr. Khadr has no rights
12 under the Constitution, he has no rights under
13 U.S. law. Presumably, he also has no rights,
14 according to this argument, and certainly this is
15 the argument that the government has made in
16 habeas proceedings, that he has no rights under
17 international law, okay. Here's what the
18 government says on page 8 of its brief, "To the
19 extent the President has extended the accused any
20 'due process' through our full and fair
21 Commission proceedings, it comes not from any
22 constitutional obligation that the accused is
23 entitled to, but from our international

1 commitment stemming from at least the Hague
2 conventions, maybe earlier, saying we will not
3 engage in summary executions and, for that
4 matter, summary punishments." As the DC
5 Appellate Court in Hamdan held, the accused
6 cannot rely on these international agreements as
7 a form of personal right and forcible in any
8 federal court. However, the President can
9 certainly decide that we will live up to our
10 agreements internationally. And I quote a couple
11 of points that I want to make here. Here, the
12 government appears to concede that the
13 requirement of a full and fair trial arises from
14 international commitments, but then at the same
15 time----

16
17 **Presiding Officer:** You got about 20 seconds.

18
19 **CDC:** Thank you. At the same time, the government
20 states that the President can decide if we would
21 "live up to those commitments," which means
22 presumably that the President can also decide we
23 would not live up to those commitments. It has

1 no standard at all. The government's position is
2 that he has no rights at all and I think that
3 that's an untenable position that goes contrary
4 to the law of this case as has been decided by a
5 federal district judge. Thank you.

6

7 **Presiding Officer:** Thank you.

8

9 I will hold any ruling until I've had the
10 opportunity to receive whatever information or
11 additional briefing the government decides to, if
12 they decide to, to offer. Once I have that, I
13 will make a decision and issue my ruling.

14

15 The last thing I want to take up is the
16 scheduling. Before I get to the scheduling
17 issue, one of the issues I think is pending in
18 this is the release of some classified
19 information. Major [REDACTED] you asked for some
20 additional time to make that available. The
21 defense was asked if they objected to that; there
22 was no response submitted.

23

1 What's the defense's position?

2

3 **DC:** We have no objection if the government needs more
4 time to get us the discovery, sir.

5

6 **Presiding Officer:** All right. Major [REDACTED] at this
7 point I am becoming increasingly concerned about
8 the amount of time that it is taking to obtain
9 the--the release of the classified information,
10 and I understand that both you along with Colonel
11 Davis, the Chief Prosecutor, have taken steps,
12 considerable steps, and made considerable effort
13 to make that happen. I would suggest, perhaps,
14 that at this point it's above your pay grade and
15 that you need to seek the assistance of those
16 above you and above Colonel Davis in resolving
17 that issue. At some point, we are going to go to
18 trial, we are going to set a trial date this
19 evening, and that needs to be resolved and
20 resolved relatively quickly, so I will direct
21 that you do that. Confer with whomever you need
22 to to get whatever action needs to be taken to
23 get a decision made. As of this point, it's

1 becoming a more and more pressing issue that
2 needs to be resolved. All right?
3
4 **PROS:** Yes, sir.
5
6 **Presiding Officer:** If you have an additional--you didn't
7 ask for an amount of time. I assume you wanted
8 another 30 days?
9
10 **PROS:** Yes, sir, although I will note that I have, I
11 think, good reason to believe that the issue will
12 be resolved very soon. I think--
13
14 **Presiding Officer:** I think you said that----
15
16 **PROS:** The conference call I mentioned----
17
18 **Presiding Officer:** I think you said that before. As I
19 said, I think you need to and I am directing you
20 to consult or confer or request assistance with
21 whomever you need to above--above Colonel Davis,
22 whoever that might be; I'll let you all decide
23 that but get it resolved.

1

2 **PROS:** Yes, sir.

3

4 **Presiding Officer:** And I want you to keep me and the
5 defense informed as to what actions are being
6 taken.

7

8 **PROS:** Yes, sir.

9

10 **Presiding Officer:** All right. I issued a subsequent trial
11 order on the 23rd of February. I believe all the
12 parties have that. The most important date on
13 there is that we are to return here during the
14 week of 5 June, during that trial term, to
15 litigate any remaining law motions and any
16 evidentiary motions and other types of motions
17 that defense desires to raise. There's also a
18 set of deadlines. Part of--rather, there's
19 already D7, where the defense objected to the
20 June session. I indicated that to the extent
21 they were objecting to that, that that objection
22 was overruled. If they decided that they needed
23 more time, they could file a continuance. I've

1 received no motion for a continuance and we will
2 proceed on that June date.

3

4 Colonel Vokey, you appear to be ready to leap to
5 your feet.

6

7 **DC:** Yes, sir. Myself and the prosecutor----

8

9 **Presiding Officer:** I need you to--I need you to step
10 behind the lectern when you address the
11 Commission.

12

13 **DC:** [Doing as directed.] I've been discussing with
14 Major [REDACTED] a trip to [REDACTED] and
15 [REDACTED] There's been some coordination made to
16 the best time that trip-- [REDACTED]

17

18

19

20

21 **Presiding Officer:** [REDACTED]

22

1 DC:

2

3

4

5 **Presiding Officer:** My understanding, and I received this
6 information in Zahir, they were talking about
7 that they were taking a trip.

8

9 DC: Yes, sir.

10

11 **Presiding Officer:** And the defense in Khadr was going to
12 go with them. I don't know whether the trial
13 counsel in Khadr was going as well, but the
14 defense was and that that trip would not
15 interfere with the [REDACTED] date.

16

17 DC: Well, I don't know about traveling with the other
18 team, sir. I--

19

20 **Presiding Officer:** Well, let me restate----

21

22 DC: I think the Zahir----

23

1 **Presiding Officer:** Let me restate it, Colonel Vokey. I
2 indicated if the defense wanted more time or
3 needed more time, they could file a motion. I
4 don't have a motion.
5
6 **DC:** All right, sir.
7
8 **Presiding Officer:** Major [REDACTED] do you want to offer
9 anything on that?
10
11 **PROS:** Sir, I have discussed with the defense. There's
12 a lot of coordination involved [REDACTED]
13 [REDACTED]----
14
15 **Presiding Officer:** No doubt.
16
17 **PROS:** ----and Afghanistan, [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 the amount of time it takes to get everything
23 done, and so they are going to account for the

1 schedules, a way to work with it. I think the
2 window that we had got to the point where it was
3 too small and Colonel Vokey had a commitment in,
4 I believe, the [REDACTED] that was unable to be
5 moved.

6
7 **Presiding Officer:** What--what commitment would that be?

8
9 **DC:** [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13
14 **Presiding Officer:** You're talking about in [REDACTED]

15
16 **DC:** I am, sir.

17
18 **PROS:** I--we talked through other possibilities of how
19 we can get everyone's scheduled on the same page
20 and we ultimately never resolved it. We couldn't
21 get the schedules to work. We decided we'd talk
22 further, and I've--I--following that, I proposed

1 these dates and kind of talked to them, the
2 defense, about it at some point.

3

4 **Presiding Officer:** At some point, were you going to talk
5 to me about it?

6

7 **PROS:** Well----

8

9 **Presiding Officer:** Because I am the one who set the
10 schedule?

11

12 **PROS:** Yes, sir. I expected that it would come up
13 either in an 8-5 or in a session here. I--I--
14 prepared what----

15

16 **Presiding Officer:** It was scheduled to come up--it was
17 scheduled after--on the 23rd of February to come
18 up today.

19

20 **DC:** Sir, I--maybe I'm mistaken, but my understanding
21 at the 8-5 in February was we were going to
22 discuss the schedule during the session, we'd all
23 have a better idea of which direction we were

1 going. I think it's both Major [REDACTED] and I's
2 understanding; that's what we're here to do.

3

4 **Presiding Officer:** Did you read 8-s, RE 87? Did you read
5 my response to you?

6

7 **DC:** Yes, sir.

8

9 **Presiding Officer:** Did you read it?

10

11 **PROS:** Yes, sir.

12

13 **Presiding Officer:** Was it--was it in question when I said
14 the dates are firm? That if the defense wanted a
15 continuance or needed the continuance beyond the
16 5th of June, that they needed to submit a motion?
17 Was my language imprecise?

18

19 **DC:** Sir, maybe I'm just confused.

20

21 **Presiding Officer:** Was my language imprecise?

22

1 **DC:** Sir, it is compared to what you said in the 8-5
2 when you said we were going to discuss the
3 schedule further.

4
5 **Presiding Officer:** All right. We are going to take a
6 recess here. I am going to allow the counsel to
7 figure it out and then we'll talk at an 8-5 and
8 we'll come back in here and resolve it. The
9 email is very specific. The parties will be
10 prepared to discuss the remainder of the trial
11 schedule beyond the 5 June trial term during the
12 3 April trial term. It also says if you want the
13 presiding officer to change the dates, you may
14 file a motion for a continuance, said motion to
15 be litigated during the April trial term. I
16 think that language is very precise and anyone
17 who read it would understand it and could comply
18 with it. We're in recess.

19
20 *The Commission Hearing recessed at 2016, 5 April 2006.*

21

22 *The Commission Hearing was called to order at 2120,*

23 *5 April 2006.*

1

2 **Presiding Officer:** The Commission will come to order. All
3 of those present when we recessed are again
4 present.

5

6 I think where we were at when we recessed,
7 discussing the trial schedule. We had an 8-5 in
8 which Major [REDACTED] Lieutenant Colonel Vokey
9 were present at and they provided me an updated
10 version of a proposed trial schedule. I will
11 have this retyped and attached to the record. As
12 it stands right now, 28 April, legal motions due;
13 12 May, responses to those motions due; 19 May,
14 replies to those motions; 26 June, we will have a
15 hearing here to litigate those motions; 21 July,
16 evidentiary motions due; 4 August, responses to
17 evidentiary motions due; 11 August, replies; 21
18 August, evidentiary motion hearing; and the week
19 of 18 September, we'll begin the trial. And I do
20 recognize and the parties do recognize that there
21 are several significant religious holidays
22 contained in that scheduled. Those will be taken
23 into account when we actually start the

1 proceedings. To the extent that that's
2 necessary, we will keep those dates in mind.

3

4 Major [REDACTED] are you amenable to that
5 schedule?

6

7 **PROS:** Yes, sir.

8

9 **Presiding Officer:** Colonel Vokey?

10

11 **DC:** The defense is also, sir.

12

13 **Presiding Officer:** And you discussed it with your co-
14 counsel?

15

16 **DC:** I have, sir.

17

18 **Presiding Officer:** All right. The other thing that we
19 discussed at the 8-5 was the appearance of
20 counsel, and I believe that the defense wants me
21 to take that up with your client. Is that a--I'm
22 getting head nods from----

23

1 **CDC:** Yes, sir.

2

3 **Presiding Officer:** ----Mr. Ahmad and Mr. Wilson.

4

5 **CDC:** That's right, Colonel.

6

7 **Presiding Officer:** Part of what we discussed, and Mr.

8 Khadr, this is for your benefit, part of what we

9 discussed during an 8-5 was the appearance of

10 counsel. And it was made known to me that there

11 may be occasions when either Mr. Wilson or Mr.

12 Ahmad will be unable to tend--to attend sessions

13 of this Commission. Have you discussed that with

14 them?

15

16 **ACC:** Yes, sir.

17

18 **Presiding Officer:** They've also indicated that you've

19 agreed that if the Commission assembles and we

20 take up business in your case, that if they are

21 not present you agree to that absence on their

22 part. Is that also correct?

23

1 **ACC:** [Conferring with his counsel.] Yes, sir.

2

3 **Presiding Officer:** Do you understand that what that means
4 is, for example, we have a session scheduled to
5 commence on the week of 26 June. We come here
6 for that session and Mr. Wilson or Mr. Ahmad are
7 not present, that we will continue with the
8 business of your case even in their absence. Do
9 you understand that?

10

11 **ACC:** Yes, sir.

12

13 **Presiding Officer:** And you've discussed that with them?

14

15 **ACC:** Yes, sir.

16

17 **Presiding Officer:** And as I understand it, it is with your
18 permission that they will determine when they
19 need to be here for a session and when they
20 decide they don't need to be here that would be
21 with your permission, if they decide they do need
22 to be here it would be with your permission. In

1 other words, the decision will be made by them as
2 to when they show up.

3

4 **ACC:** [Conferring with his counsel.] Yes, sir.

5

6 **Presiding Officer:** Do you understand that?

7

8 **ACC:** Yes.

9

10 **Presiding Officer:** And you're amenable to that?

11

12 **ACC:** Yes.

13

14 **Presiding Officer:** And would you agree with that?

15

16 **ACC:** Yes.

17

18 **Presiding Officer:** And your decision tonight as to the
19 when--when and if they show up, you understand
20 that it is not just for those sessions that we
21 have scheduled right now but if other sessions
22 should come up or there should be a need for
23 other sessions of this Commission to deal with

1 your case, that if they are not present, that
2 that present--their absence will not stop the
3 business of this Commission.

4

5 **ACC:** Yes.

6

7 **Presiding Officer:** And you believe that even if both of
8 them were absent, that Captain Merriam and
9 Lieutenant Colonel Vokey are able to fully
10 represent your interest?

11

12 **ACC:** [Conferring with his counsel.] Yes.

13

14 **Presiding Officer:** I'm sorry.

15

16 **ACC:** Yes, sir.

17

18 **Presiding Officer:** Do you need any more time to discuss
19 this with either Mr. Wilson, Mr. Ahmad, or your
20 detailed military counsel?

21

22 **ACC:** [Conferring with his counsel.] No.

23

1 **Presiding Officer:** And, Mr. Wilson, do you believe this is
2 in your client's best interest?
3
4 **CDC2:** I do.
5
6 **Presiding Officer:** Mr. Ahmad?
7
8 **CDC:** I do.
9
10 **Presiding Officer:** And you are both satisfied that Colonel
11 Vokey and Captain Merriam will be able to take
12 care of any business that should come up before
13 the Commission, even in your absences?
14
15 **CDC2:** They are more than capable, Colonel.
16
17 **Presiding Officer:** Mr. Ahmad?
18
19 **CDC:** I agree.
20
21 **Presiding Officer:** Colonel Vokey, are you amenable to this
22 as well?
23

1 **DC:** I am, sir.

2

3 **Presiding Officer:** Captain Merriam?

4

5 **ADC:** Yes, sir.

6

7 **Presiding Officer:** And you both believe it's in your

8 client's best interest?

9

10 **DC:** Yes, sir; it is, sir.

11

12 **ADC:** Yes, sir.

13

14 **Presiding Officer:** Very well. Your absence then, if you'd

15 determined that's appropriate, is approved in

16 advance.

17

18 Mr. Khadr, if at some point you decide that you

19 want to revoke your permission for them to be

20 absent, you need to inform me. You do that

21 through Colonel Vokey or Captain Merriam, and we

22 will take it up at a session. It will not,

23 however, obligate either Mr. Wilson or Mr. Ahmad

1 to be present at that session when we discuss
2 your revocation of that. Do you understand that?

3

4 **ACC:** Yes, sir.

5

6 **Presiding Officer:** All right. I think the last thing that
7 I wanted to mention before we recess for the
8 evening has to do with the issue of solitary
9 confinement. I believe the parties have
10 indicated that they would be prepared possibly
11 some time tomorrow with both evidence to present
12 on the issue as well as legal briefs. Is that
13 correct?

14

15 **DC:** Yes, sir.

16

17 **Presiding Officer:** Major [REDACTED]

18

19 **PROS:** We would----

20

21 **Presiding Officer:** I'm not trying to pin you down. I--
22 I--my understanding is you believe you will be
23 ready some time tomorrow. After you're ready, we

1 will set a time, hopefully, when we can litigate
2 the issue.

3

4 **PROS:** I can't speak to legal briefs necessarily, sir.
5 I haven't seen what the defense is going to be
6 arguing in their legal brief. So, obviously,
7 depending--if they don't give us a brief until
8 tomorrow afternoon, we need sufficient time to
9 reply.

10

11 **Presiding Officer:** I'll give you time.

12

13 **PROS:** I can say with--they've--they've provided
14 discovery request. I am going to answer that
15 hopefully by first thing in the morning with the
16 information and, I guess, we can go from there,
17 sir.

18

19 **Presiding Officer:** All right. I'm sorry, they provided
20 you what?

21

1 **PROS:** A discovery request via email, just requesting
2 information that they are trying to find out
3 about why the accused was moved.

4
5 **Presiding Officer:** Oh. You anticipate providing that
6 information to them by when?

7
8 **PROS:** I would say mid morning tomorrow, sir. I'll know
9 more when we leave here tonight, but----

10
11 **Presiding Officer:** All right. But I'd ask the parties to
12 just keep me informed. It is a very full trial
13 schedule this week. The logistics of moving the
14 accused are significant, and so we need time to
15 get the Joint Task Force personnel the
16 opportunity to make the necessary arrangements.
17 Also, there are other hearings going on in the
18 other cases. This is the only hearing room we
19 have, so we have to be mindful of that as well.

20
21 And I believe, Mr. Ahmad, you're scheduled to
22 leave on Friday?

23

1 **CDC:** That's right, Colonel.

2

3 **Presiding Officer:** So if we go after--or, on Friday or
4 later, then in all likelihood you will not be
5 here?

6

7 **CDC:** That's right.

8

9 **Presiding Officer:** I want to make one further comment; I
10 want to do this on the record. I've been handed
11 significant number of cases through the course of
12 this day's proceedings and been asked to read and
13 digest and be ready to respond to those. I came
14 down here with the intention of setting a trial,
15 a date of trial, not to hear motions but to
16 actually start this trial, and neither counsel
17 informed me that there was a problem or potential
18 problem and that they anticipated changing that
19 schedule. It is possible to adjust to almost
20 anything if you know about it in advance; it is
21 not possible to adjust if you're hit with it in
22 the middle of a hearing. I would ask counsel to
23 show me that courtesy of keeping me informed if

1 there's a problem so that we can address it in a
2 professional, competent manner, so we can ensure
3 that the rights of all the parties are protected
4 and these Commission proceedings can proceed
5 accordingly. Springing things on each other,
6 springing things on me, are not what I would
7 characterize professional. Please keep that in
8 mind as we move forward so we can focus on the
9 facts and the law and it doesn't become a matter
10 of personalities.

11

12 Anything else from either side?

13

14 **PROS:** No, sir.

15

16 **DC:** No, sir.

17

18 **Presiding Officer:** We're in recess.

19

20 *The Commission Hearing recessed at 2130, 5 April 2006.*

21

22 *The Commission Hearing was called to order at 1300,*

23 *7 April 2006.*

1

2 **Presiding Officer:** The Commission will come to order. All

3 of those present when we recessed are again

4 present with the exception of Lieutenant [REDACTED]

5 and Mr. Ahmad, who are both absent with my

6 permission. And, as we discussed on the record

7 at the last session, with the permission of Mr.

8 Khadr.

9

10 The defense made an oral motion seeking relief

11 from the presiding officer, specifically

12 requesting that the presiding officer order the

13 accused moved from Camp 5 back to Camp 4. In

14 response to that oral motion, I indicated if the

15 defense wanted relief it was necessary for the

16 defense to file a written motion that complied

17 with the provisions of POM 4-3. On 6 April, the

18 defense filed their written motion, which is now

19 marked as RE 108, and submitted evidence in

20 support of that motion. In response to the

21 filing of the motion, I scheduled this session.

22

1 We had An 8-5 this morning, in which Major
2 [REDACTED] Lieutenant Colonel Vokey, Captain
3 Merriam, and Mr. Wilson were present. During
4 that conference, I was informed by Lieutenant
5 Colonel Vokey that the defense was withdrawing
6 their motion. I informed the parties that we
7 would discuss this matter here in open court.
8
9 Lieutenant Colonel Vokey, is it your desire to
10 withdraw the motion contained in RE 108?
11
12 **DC:** Sir, it is my--it is the defense's desire to
13 withdraw the motion. I further state it is not
14 because--it is not withdrawn because I don't
15 believe you have the--that you lack authority to
16 act on it. It is not been withdrawn due to any
17 denial of access to witnesses. It is not being
18 withdrawn because we haven't had time to prepare
19 or that we were forced to withdraw. And we do
20 think that it is in our client's best interest to
21 withdraw the motion. Furthermore, sir, the--
22 after talking with the government officials
23 subsequent to the filing of the motion, we were

1 satisfied that the move is not--was not made as a
2 form of punishment, and that the conditions of
3 the confinement currently, right now, are not
4 affecting the ability of us to maintain a
5 relationship with our client.

6

7 **Presiding Officer:** So you're satisfied, then, that you've
8 had access to all the evidence, potential
9 witnesses, and other matters that you've needed
10 or would need in order to file and litigate this
11 motion?

12

13 **DC:** I am, sir.

14

15 **Presiding Officer:** And you've had sufficient time to both
16 prepare in your own right and to prepare in terms
17 of meeting with your client, discussing this
18 issue with your client?

19

20 **DC:** Yes, sir.

21

1 **Presiding Officer:** You indicated you were satisfied that
2 it is not--he was not moved as an issue of
3 punishment.

4
5 **DC:** Yes, sir.

6
7 **Presiding Officer:** You also had indicated that the
8 conditions of confinement that were in existence
9 and are now in existence--interfering with your
10 ability to develop an appropriate relationship
11 with your client?

12
13 **DC:** That's correct, sir.

14
15 **Presiding Officer:** Do you believe that that is no longer
16 the case?

17
18 **DC:** That is no longer the case, correct, sir.

19
20 **Presiding Officer:** And you are able to meet with your
21 client and develop the necessary report so that
22 you and the other defense counsel can in fact
23 represent him?

1

2 **DC:** Yes, sir.

3

4 **Presiding Officer:** And he is able to adequately prepare
5 and assist in his own defense?

6

7 **DC:** Yes, sir.

8

9 **Presiding Officer:** The conditions of his confinement are
10 not adversely affecting that?

11

12 **DC:** That's correct, sir.

13

14 **Presiding Officer:** You also, during the oral portion of
15 the hearing, indicated that his treatment was
16 inhumane. Do you believe his treatment is still
17 inhumane?

18

19 **DC:** I do not, sir. I do not believe that the move
20 from Camp 4 to Camp 5 was inhumane.

21

22 **Presiding Officer:** Do you believe it was for a legitimate
23 government purpose?

1

2 **DC:** I do, sir.

3

4 **Presiding Officer:** And a proper purpose?

5

6 **DC:** I do, sir.

7

8 **Presiding Officer:** I think you already indicated you
9 thought it was, in fact, in your client's best
10 interest to withdraw this motion?

11

12 **DC:** I do, sir.

13

14 **Presiding Officer:** All right. The motion is considered
15 withdrawn. During the 8--thank you, Colonel
16 Vokey.

17

18 During our 8-5, we discussed the--there were
19 several review exhibits that were attached to the
20 record, that is, 97 through 99. There was also
21 Review Exhibit 108 and 109. We discussed those

1 exhibits and have agreed upon the proper handling
2 of those exhibits.

3

4 Is that true, Major [REDACTED]

5

6 **PROS:** Yes, sir.

7

8 **Presiding Officer:** Lieutenant Colonel Vokey?

9

10 **DC:** Yes, sir.

11

12 **Presiding Officer:** During our last session, I made some
13 comments about keeping the Commission informed of
14 what was going on. I do want to compliment the
15 counsel for the last 2 days, in particular that
16 the defense has made a concerted effort to keep
17 me informed, to provide me information at the
18 earliest opportunity. I do appreciate that. It
19 very much does lend itself to the orderly
20 disposition of the matters that are necessary to
21 bring before this commission.

22

1 The other thing that was discussed on several
2 occasions during our last session was the proper
3 form for seeking relief. There was some
4 discussion as to how that should be done. And I
5 do want to remind the parties, just like any
6 trial court, if a party needs relief or wants to
7 seek relief from the presiding officer of this
8 Commission, you need to follow the provisions on-
9 -POM 4-3, that is, you investigate, research,
10 write a brief, then file the motion on the
11 presiding officer as well as opposing counsel,
12 and we will set a time to litigate any motions
13 that the parties deem appropriate to raise. As I
14 indicated, I will not speculate on what the legal
15 issues are or what the possible remedies might
16 be, because to do so would be inappropriate. I
17 know of no trial court, trial judge, and I do
18 recognize the difference between a trial court
19 and this Commission, but I know of none who would
20 entertain an issue in such a manner and then be
21 asked to speculate on what possible remedies
22 might be or what the law is or what the
23 authorities of that court might be.

1

2 Is there anything else we need to discuss before
3 we recess?

4

5 **PROS:** Nothing from the prosecution, sir.

6

7 **DC:** Sir, you discussed the RE exhibits that--the
8 handling of them. Maybe I----

9

10 **Presiding Officer:** I thought we'd done it satisfactorily.

11

12 **DC:** Very well, sir.

13

14 **Presiding Officer:** We talked about it at the 8-5. I
15 thought we'd satisfied the parties concerns.

16

17 **DC:** You have, sir. Very well, sir.

18

19 **Presiding Officer:** I did have RE 101, which is the trial
20 schedule that I was handed retyped and that would
21 be republished; the one I have was--has some
22 handwriting on it and was retyped by Mr. Hodges
23 and will be reissued to the parties. It just

1 simply reflects the same dates that we'd agreed
2 upon, but in a little neater form.

3

4 Being nothing further, the Commission is in
5 recess.

6

7 *The Commission Hearing recessed at 1307, 7 April 2006.*

8

9

[END OF PAGE]

AUTHENTICATION OF
COMMISSION TRIAL PROCEDURES

in the case of:

United States v. Omar Ahmed Khadr

a/k/a/ Akhbar Farhad

a/k/a Akhbar Farnad

This is to certify that the Pages 232 through
598 (including this Authentication Page) are an
accurate and verbatim transcript of the proceedings
in the above styled case.



Robert S. Chester
Colonel, USMC

4 May 2006
DATE